IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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MISCELLANEOUS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner Morton Eisen prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered on May 1, 1973, which reversed two orders of the United States District Court for the Southern District of New York holding that Petitioner's action was maintainable as a class action, and that defendants should bear part of the cost of notifying the class. The Court of Appeals denied a petition for rehearing in banc on May 24, 1973 by a five to three vote. Petitioner also seeks review of the March 8, 1968 decision of the Court of Appeals holding that notice of the pendency of a class action is required in cases maintained under Rules 23(b)(1) and 23(b)(2) as well as in those maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure (hereinafter "Rule 23").

The following opinions and orders of the Court of Appeals for the Second Circuit are not yet officially reported. They are printed in the Appendix as indicated.

(1) Opinion of May 1, 1973 reversing the order of the district court (Medina and Lumbard, Circuit Judges, per Medina, J.) at 92a-120a.[1]

(2) Concurring opinion of Judge Hays of May 1, 1973 at 120a.

(3) Opinion of May 24, 1973 denying rehearing in banc (Kaufman, Circuit Judge, Judges Friendly, Feinberg, Mansfield and Mulligan, concurring) at 121a-122a.

(4) Concurring opinion of Judge Mansfield on denial of rehearing at 123a.

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1. Page references are to the pages of the Appendix, separately presented pursuant to rule 23(i) of the Rules of this Court.

(5) Dissent of Judge Hays from denial of rehearing at 123a.

(6) Dissent of Judge Oakes (Judge Timbers concurring) from denial of rehearing at 123a-134a.

(7) Order of the Court of Appeals dated May 1, 1972 (Medina, Lumbard and Hays, Circuit Judges) granting defendants' motion to require the District Court clerk to certify and transmit the record to the Court of Appeals at 88a.

(8) Order of the Court of Appeals dated June 29, 1972 (Medina, Lumbard and Hays, Circuit Judges), denying plaintiff's motion to dismiss the appeal filed by defendants on May 2, 1972 from the orders of the District Court at 91a.

Earlier opinions in this litigation are reported at 41 F. R. D. 147 (S. D. N. Y. 1966); 370 F. 2d 119 (2d Cir. 1966), *cert. denied,* 386 U. S. 1035; 391 F. 2d 555 (2d Cir. 1968); 50 F. R. D. 471 (S. D. N. Y. 1970); 52 F. R. D. 253 (S. D. N. Y. 1971); and 54 F. R. D. 565 (S. D. N. Y. 1972). Except for the opinions reported at 41 F. R. D. 147 and 50 F. R. D. 471, they are printed in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on May 1, 1973. A timely petition for rehearing, containing a suggestion that the action be reheard in banc, was filed on May 11, 1973, and was denied on May 24, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Should a class action maintainable under Rule 23 be dismissed because the individual class representative cannot afford to pay for individual notice of its pendency to two million identifiable class members?

2. Is individual notice to two million identifiable class members required by due process or Rule 23, where the statute of limitations has run on the damage claims of the class, so that their interest in electing exclusion from the class is minimal?

3. Is due process satisfied in a class action maintained under Rule 23 by adequacy of representation and published notice rather than individual notice?

4. Is notice of the pendency of a class action required in a class action maintained under Rule 23(b)(1) or (2) of the Federal Rules of Civil Procedure?

5. Does Rule 23 or due process preclude the District Court from allocating the cost of the class action notice among the parties, on the basis of the probability of the plaintiff's success on the merits, as determined in a preliminary evidentiary hearing?

6. Did the Court of Appeals err in holding the class action to be unmanageable prior to trial on the issue of liability, even though fifty six percent of the transactions of the class are preserved on computer records?

7. Did the Court of Appeals err in rejecting out-of-hand a possible form of class action relief under which defendants might be required to disgorge the fruits of their antitrust and Securities Act violations under the so-called "fluid recovery" theory?

8. Did the Court of Appeals apply an improper standard of review in denying to the District Court broad discretion in making a class action determination under Rule 23?

9. Did the Court of Appeals have jurisdiction of defendants' appeal from the class action determination of the District Court, where no final order had been entered and leave to appeal had not been obtained under 28 U. S. C. Section 1292(b)?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULE INVOLVED.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution. The rule involved is Rule 23 of the Federal Rules of Civil Procedure. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2 and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(f) and 78aa (the "Exchange Act"), and 28 U. S. C. §§ 1291 and 1292(b).

The text of Rule 23 is as follows:

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative

parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the

difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular

issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

* * *

The texts of the Fifth Amendment and the statutory provisions are printed in the Appendix.

STATEMENT OF THE CASE.

The Complaint.

The complaint alleges that in the period 1962-1966 the two odd-lot brokerage firm defendants (Carlisle & Jacquelin and DeCoppet & Doremus, hereinafter "the odd-lot defendants"), who controlled ninety-nine percent of the odd-lot business, illegally fixed the odd-lot differential charged to the investing public at an excessive level in violation of the federal antitrust laws, and that such price-fixing was done with the acquiescence of the defendant New York Stock Exchange (hereinafter the "Exchange") in disregard of its regulatory and fiduciary duties to investors, in violation of the Securities Exchange Act of 1934 ("Exchange Act").[2] The Complaint requests treble damages and injunctive relief for defendants' antitrust violations, and damages and injunctive relief against the Exchange for violation of the Exchange Act. The District Court's jurisdiction was based on 28 U. S. C. § 1337. The action arises under Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, and under Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(f) and 78aa.

The Class Action.

The action was brought on May 2, 1966 as a class action on behalf of all persons who were forced to pay the differential. On September 27, 1966, the District Court

2. Odd-lots are shares traded in lots of less than a hundred. Shares traded in multiples of a hundred are round lots. During the period 1962-1966 the odd-lot differential (a surcharge in addition to the standard commission imposed on odd-lot transactions) was 12½ cents per share on all stocks selling below $40 per share and 25 cents per share on all stocks selling at or more than $40 per share; on July 1, 1966 the "break point" was raised to $55 per share.

dismissed the action as a class action (41 F. R. D. 147). Plaintiff appealed the dismissal to the Court of Appeals for the Second Circuit. Defendants' motion to dismiss the appeal as not being taken from a final order was denied, on the ground that dismissal of the class action was the "death knell" of the entire action, and was, therefore, a final appealable order (1a-4a). This Court denied certiorari. 386 U. S. 1035. By opinion dated March 8, 1968, the Court of Appeals reversed the District Court's original dismissal of the action as a class action and held that the suit was in all respects maintainable as a class action under Rule 23(a) and 23(b)(3)[3] except that a further evidentiary hearing would be required with respect to the issues of "notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper" (5a, 28a). The Court of Appeals stated:

> "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (7a).

The Court further stated:

> ". . . courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants." (21a).

Moreover, the Court held that Rule 23 "should be given a liberal rather than a restrictive interpretation." (14a).

3. The Court of Appeals held that the class action was not maintainable under Rule 23(b)(1) or (b)(2).

The District Court Hearings.

On remand the District Court held two sets of hearings. The first dealt with whether the case could be maintained as a class action. On the basis of a complete record, in which most of the facts were stipulated, the District Court held that the prerequisites to maintenance of a class action were satisfied.

The District Court, heeding the Court of Appeals' admonition that Rule 23 was intended "to provide a thoroughly flexible remedy" (8a), held that: "Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof . . .", deeming it "appropriate . . . to consider some kind of 'fluid class recovery', i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial planning stage, an inflexible mold of recovery running to specific class members." "Fluid recovery" would be accomplished by establishing a fund equivalent to the amount of unclaimed damages and reducing the odd-lot differential on future transactions in an amount determined reasonable by the Court until the fund was depleted. The District Court emphasized, however, that: "Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder." (49a-50a). The District Court also found, by analyzing the record in other class actions, that the expense of administration would not engulf the prospective recovery (45a-47a, 51a).

The Class Notice.

The District Court held that the requirements of due process and Rule 23(c)(2) would be satisfied by publication in the national edition of the Wall Street Journal and

in New York, San Francisco and Los Angeles newspapers, supplemented by mailing of an initial individual notice to the most active members of the class, followed by more extensive notice in the event that the defendants were found liable. The court accordingly ordered individual notice to be sent "to the approximately 2,000 or more class members who had ten or more transactions during the relevant period."[4] This notice program was tailored to the Court of Appeals' suggestion that the notice effort should be concentrated upon those class members who may have "enough of a stake in the proceedings to justify personal intervention . . ." (26a). The District Court further directed: "[I]n order to insure adequate representation and to gain more information about the nature of the class, individual notice shall also be mailed to 5,000 other class members selected at random from the 2,000,000 persons and firms who are identifiable." In addition, the District Court noted that plaintiff had offered to send copies of the notice to all member firms of the Exchange and to all commercial banks with large trust departments. Plaintiff also suggested that the notice could be included in the confirmations and monthly statements sent to their customers by the member firms (54a-56a).

Having decided that the requirements of Rule 23 for maintenance of a class action were satisfied, the District Court proceeded to deal with the question who should bear the cost of notice to the class, reasoning that: "If the expense of notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a

4. This figure was based only on a representative sample of four of the fourteen wirehouses which had such tapes. The District Court assumed that a survey of the remaining tapes would turn up more than the 2,000.

restrictive interpretation. Eisen II at 563. On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim" (58a). As a solution the court decided to hold a preliminary hearing for the purpose of determining whether plaintiff's chance of success on the merits was sufficient to justify imposing the cost of notice on the defendants.

The Evidence of Defendants' Liability.

On the basis of a record, most of which consisted of the defendants' own documents which they put in evidence themselves, the District Court found that plaintiff and the class "are more than likely to prevail at trial or upon a motion for summary judgment" (86a). The court found that plaintiff had made a strong showing that the odd-lot defendants had engaged in price-fixing, market division, and other anti-competitive practices, none of which was exempt from the antitrust laws. Counsel for the odd-lot defendants admitted that the differential was the result of "most intense negotiation between the odd-lot houses among themselves. . . ." The two firms always charged exactly the same differential, and when the differential was changed, each firm changed it identically at the identical moment. They claimed that they were entitled to "a special exception" that made compliance with the federal antitrust laws unnecessary. The District Court found that no special exception was warranted.

The District Court likewise found that the plaintiff had presented "excellent evidence" of liability against the Exchange, resulting primarily from the Exchange's failure to prevent the odd-lot defendants from charging their excessive differential to the public (86a).

Accordingly the District Court imposed 90% of the total notice cost of $21,720 on the defendants (87a).

The Court of Appeals Decision.

Following the District Court's order allocating ninety percent of the cost of notice to them, the defendants obtained an order from the Court of Appeals on May 1, 1972 (over plaintiff's objection that the Court of Appeals had no jurisdiction to enter such an order) directing the Clerk of the District Court to certify and transmit the record for review (88a). Thereafter, defendants also filed a notice of appeal from the orders of the District Court. Plaintiff moved to dismiss the appeal as not being taken from a final order. The motion was denied on June 29, 1972 (91a).

On May 1, 1973 the Court of Appeals (Medina and Lumbard, Circuit Judges; Hays, Circuit Judge, concurring in the result) reversed the orders of the District Court which had sustained the prosecution of the case as a class action, and dismissed the case as a class action.

The Court of Appeals held:

1. In virtually every class action—whether brought under Rule 23(b)(1), (b)(2) or (b)(3)—and whether plaintiff's claim appears to be meritorious or not—plaintiff must send and pay for individual notice to every class member who can be identified (97a, 109a).

2. The District Court has no discretion under Rule 23 to fashion an equitable remedy appropriate to the kind of wrong and the type of class involved; rather, unless precise repayment can be made to every person who suffered from the alleged wrong, no repayment need be made at all. Hence, even the theoretical possibility of a "fluid class" recovery was rejected (116a).

3. In addition to rejecting the "fluid class theory", the Court held the class action unmanageable, even though 56% of the challenged transactions are recorded on com-

puter tapes, so that class members could be repaid directly and precisely with regard to those transactions (35a).

4. Any kind of newspaper notice is "a farce" (114a); due process and Rule 23 require that every class member must receive individual notice of the pendency of the action (109a, 114a).

5. The merits of the case are irrelevant; no matter how apparent and gross the wrong, a class action cannot be maintained unless plaintiff first gives and pays for individual notice pursuant to Rule 23(c)(2). The District Court has no jurisdiction either to evaluate the merits of plaintiff's claim or to allocate the cost of notice (112a).

Judge Hays concurred in the result, "unable to accept the ruling of the district court requiring the defendants to pay ninety percent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure." Judge Hays was presumably referring only to the notice as ordered by the District Court. He did not join the majority in holding that 2,000,000 individual notices were required (120a).

The Petition for Rehearing in Banc.

Plaintiff petitioned the Court of Appeals for a rehearing in banc. Five members of the Court (per Judge Kaufman with Judges Friendly, Feinberg, Mansfield and Mulligan concurring) voted to deny rehearing only because "the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. . . . [W]e wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration." (122a).

Judges Hays, Oakes and Timbers voted for a rehearing in banc. Judge Oakes (with Judge Timbers concurring) filed an opinion which states:

1. "The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens."

2. "The panel opinion reaches a result which is very doubtful to say the least; on its face it appears to nullify much of Fed. R. Civ. P. 23." (124a).

3. "The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance." (125a-6a).

4. Notice by publication is not "a farce", but is rather, "highly effective" (129a-130a).

5. The panel opinion "not merely ossifies, but destroys" class actions, an important procedural device. (130a).

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

This case involves questions of the greatest importance in the administration of class actions under Rule 23 of the Federal Rules of Civil Procedure. The petition comes before the Court with extraordinary credentials. As noted above, Judge Kaufman expressed the view of the five judges of the Court of Appeals who voted to deny rehearing in banc that "the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction." (122a). The Court decided against a rehearing in banc because it desired to "speed this case on its way to the Supreme Court." (122a). Judge Oakes' dissent (Judge Timbers concurring) agreed: "The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens." (124a).

The questions of notice to the class and manageability presented by this case go to the heart of Rule 23. They should be resolved by this Court, because they affect virtually all class actions now pending in the federal courts, including such vast and notorious cases as those arising out of the collapse of Penn Central, Equity Funding Corporation and National Student Marketing Corporation.

The defendants represented to the Court of Appeals that it "should review now this very important and devel-

oping area of the law that is now at the crossroads . . ."[5] Thus, the importance of the questions raised is not in dispute.

II.

The Court of Appeals Has Decided Federal Questions in a Way in Conflict With Applicable Decisions of This Court.

The Court of Appeals' decision conflicts with applicable decisions of this Court on notice as a requirement of due process and the scope of Rule 23 as an instrument of antitrust and Securities Act enforcement.

A. Individual Notice Is Not Required by Due Process

The Court of Appeals holding that individual notice must be sent to every single class member, conflicts with this Court's decision in *Hansberry v. Lee*, 311 U. S. 32, 41-43 (1940). In *Hansberry* this Court held that since "[t]he class suit was an invention of equity", a decision would be binding on all class members whether they were technical parties or not and whether they had notice or not, provided only that the class is adequately represented by a litigant with "a common interest". Since the Second Circuit did not reverse the finding of the District Court that Eisen would fairly and adequately represent the class, (42a) it necessarily follows, under *Hansberry*, that notice to each class member is not required for the case to proceed.

Further, in *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 313-4 (1950), this Court said: "A construction

5. April 11, 1972 affidavit of William E. Jackson in support of defendants' motion seeking review of the District Court's class action determinations.

of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." Yet that is precisely what the Court of Appeals has done here.

B. Rule 23 Should Be Given Broad Scope as an Instrument of Antitrust and Securities Act Enforcement.

The decision of the Court of Appeals destroys the effectiveness of Rule 23 as a means of vindicating the high public purpose inherent in private enforcement of the federal antitrust and securities laws, in conflict with applicable decisions of this Court.

In *State of Hawaii v. Standard Oil Co. of California*, 405 U. S. 251 (1972), Hawaii had argued that ". . . the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and [that] . . . denying Hawaii the right to sue for injury to her quasi-sovereign interests . . . [would therefore] allow antitrust violations to go virtually unremedied . . ." This Court responded:

> "Private citizens are not as powerless, however, as the State suggests.
>
> "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U. S. C. § 1337; 15 U. S. C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." 405 U. S. at 265-66.

The *Eisen* decision rejects the role assigned to treble damage plaintiffs as "private attorneys-general", a function

equally fulfilled in private enforcement of the Exchange Act. *Perma Life Mufflers v. International Parts Corp.*, 392 U. S. 134, 138-9 (1968); *J. I. Case Co. v. Borak*, 377 U. S. 426, 432 (1964).

The *Eisen* decision seriously limits private enforcement of the federal antitrust and securities laws and holds that there is nothing the federal courts can do "in situations where immense numbers of consumers have been mulcted in various ways by illegal charges." (118a). The *Eisen* decision holds that for such wrongs there is a "lack of adequate remedy under existing laws." (118a). This ignores the equitable origin and character of the class action, recognized by this Court in *Hansberry v. Lee, supra*, 311 U. S. at 41, and *Smith v. Swormstedt*, 57 U. S. 288 (1853).

With respect to plaintiff's Exchange Act claims, the decision is contrary to the unanimous holding of this Court in *J. I. Case Co. v. Borak, supra*, that: ". . . it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." This Court stated:

> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' Bell v. Hood, 327 U. S. 678, 684 (1946). . . . Section 27 grants the District Courts jurisdiction 'of all suits in equity and actions at law brought to enforce any liability or duty created by this title. . . .'" 377 U. S. at 433.

The *Eisen* decision also conflicts with this Court's decision in *Hanover Shoe Co. v. United Shoe Machinery*

Corp., 392 U. S. 481 (1968), in which the Court refused to countenance a result whereby ". . . those who violate the antitrust laws by price-fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." 392 U. S. at 494. This Court noted that the class sought to be protected in *Hanover Shoe*, the "ultimate consumers", do not usually bring class actions, and so permitted a plaintiff, which may have passed on its damages, to bring the action. In *Eisen* the consumers themselves have sued; *a fortiori* they should be allowed to continue the action.

Hanover Shoe itself followed the holding in *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 265 (1946) in which this Court reaffirmed that:

> " 'The constant tendency of the Courts is to find some way in which damages can be awarded where a wrong has been done.' "

In light of the conflict with such fundamental decisions of this Court, the *Eisen* decision should not be allowed to stand.

III.

The Eisen Decision Is in Conflict With Decisions of Other Courts of Appeals, as Well as Creating a Conflict Within the Second Circuit Itself.

The *Eisen* decision conflicts with the decisions of other Courts of Appeals on such fundamental questions as the need for notice in Rule 23(b)(1) and (2) cases, the discretion afforded to district courts in their class action determinations, and the appealability of class action determinations; and the *Eisen* decision also conflicts with the decision of another panel of the Second Circuit on the basic questions of notice by publication and the use of the fluid class theory.

A. The Fourth Circuit Has Held, Contrary to Eisen, That Notice Is Not Required in a 23(b)(2) Class Action.

The Court of Appeals held categorically in its 1968 Opinion that notice of the pendency of the action is required in all class actions, even those brought under Rule 23(b)(1) or (2) (16a-17a). The Fourth Circuit, in *Hammond v. Powell*, 462 F. 2d 1053, 1055 (4th Cir. 1972) ruled exactly the other way:

> "Furthermore, since this class action plainly comes within the ambit of F. R. Civ. P. Rule 23(b)(2), the notice requirement of Rule 23(c)(2) does not apply."

Since many important class actions fall within the scope of Rule 23(b)(2), including Eisen and most civil rights cases, this Court should resolve this conflict.

B. The Third and Tenth Circuits Have Held, Contrary to Eisen, That the District Court Must Be Allowed Broad Discretion in Class Action Determinations.

The *Eisen* decision is in conflict with a recent decision of the Third Circuit, *Katz v. Carte Blanche Corporation*, — F. 2d — (3d Cir. 1973) (Petition for Rehearing In Banc granted, June 20, 1973).[6] The essence of the *Katz* decision is that "great deference" should be given a District Court's class action determination. *Eisen* is directly to the contrary. In *Katz* the Court stated the issues on appeal as follows:

> "(1) the standard to be applied . . . in reviewing the district court's pretrial grant of the class action; and
>
> "(2) under that standard, whether the district court erred in granting the motion."

6. The decision is not yet officially reported. It is printed in the Appendix at 135a-145a.

Under Rule 23 the district court retains discretion to modify its class action determination at any time before a final decision on the merits. The Third Circuit held that:

> "The district court's opportunity to review its own decision throughout the proceeding is part of the scheme in Rule 23 to vest broad discretion in the district court when dealing with class actions. Clearly, this broad discretion is essential if the court is to cope with the problems inherent in managing a class suit. Consequently, where the district court has granted a pretrial motion to proceed as a class, and where immediate appeal has been permitted, we conclude the appellant must make a convincing showing that the district court committed an abuse of discretion in granting the motion. Only, then will this court intercede."

The Court of Appeals for the Tenth Circuit has manifested the same view, albeit in affirming disallowance of a Truth-in-Lending class action. *Wilcox v. Commerce Bank of Kansas City*, 474 F. 2d 336 (10th Cir. 1973). The Court regarded as the "seemingly most sensible alternative" that ". . . trial courts be permitted in the exercise of sound discretion to determine within broad and open-ended guidelines whether . . . [class action treatment] is superior to other available methods for the fair and efficient adjudication of the controversy on a case by case basis." 474 F. 2d at 348. Further, the Court stated: "We believe that the solution may well be to continue straight ahead for a time under the present Rule, but to smooth out to a degree the formal obstacles that may be unduly obstructing trial courts on the firing line in realistic and practical ap-

plications within their sound discretion and in view of superior opportunity to observe the battle conditions case by case." Id. at 349.

Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . . ." What is "the best notice practicable" and what constitutes "reasonable effort" are plainly determinations which lie within the sound discretion of the District Court. Likewise, "fluid recovery" was not inflexibly adopted by the District Court, to the exclusion of individual claims (50a). Indeed, 56 percent of the odd-lot transactions on the Exchange were recorded on computer tapes and could clearly form the basis for individual recoveries (35a).

The *Eisen* decision inflexibly holds that there is no area within which the District Court's discretion may operate.

C. "Fluid Recovery" and Notice by Publication Have Previously Been Approved by the Second Circuit.

The *Eisen* decision conflicts with the decision of another panel of the Second Circuit approving both a fluid recovery and notice by publication to the consumer class in the tetracycline price-fixing litigation. On the question of notice, the Court held "There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case. In the present action notice by publication was obviously the only practical alterna-

tive."[7] *State of West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079, 1090 (2d Cir.), *cert. denied, sub nom.; Cotler Drugs, Inc. v. Charles Pfizer & Co.*, 404 U. S. 871 (1971). The need for individual notice, to enable individual class members to elect exclusion from the class, to press their own claims, is minimal in *Eisen*, where the statute of limitations has run on the damage period.

The conflict within the Circuit is emphasized by the statement in Judge Kaufman's opinion, denying rehearing in banc, that: ". . . the application for certiorari will not go to the Supreme Court barren of the views of the judges of this Court, as, for example, in the Pentagon Papers case, where the Court convened en banc but, because of urgent time considerations, did not write opinions. Judge Oakes has set forth his views on the merits with vigor and Judge Medina's panel opinion articulates the opposing position" (122a). Furthermore, Judge Hays, who concurred only in the result of the panel's decision, on the ground that the defendants should not be required to pay for any part of the cost of the notice as ordered by the District Court, presumably did not agree that 2,000,000 individual notices were required. The Court of Appeals did not choose to resolve this intramural conflict, confident that this Court would grant certiorari.

In *Eisen*, the Court of Appeals, which in its 1968 opinion held that Rule 23 was to be "given a liberal rather than a restrictive interpretation" (14a) has now shackled the district courts, depriving them of their broad discretion and substituting its own now narrow views of the Rule. In Judge Oakes' view: "The panel's decision seems utterly inconsistent with the flexible, equitable spirit that moti-

7. The Court's approval of the class aspects of the case was a necessary predicate to its approval of the settlement that was being appealed. 440 F. 2d at 1089. It is thus immaterial that the case was decided in a settlement, rather than a litigation context.

vated the innovative 1966 amendments to Fed. R. Civ. P. 23." (127a). The conflict between circuits and within the Second Circuit itself should be resolved by this Court.

D. The Court of Appeals Had No Jurisdiction of Defendants' Appeal.

The Court of Appeals allowed the appeal from the District Court to go forward on two bases, both of which are erroneous and in conflict with the decision of another circuit, as well as with other decisions within the Second Circuit.

As a first basis of jurisdiction the Court of Appeals relied on the statement in its 1968 decision that "we retain jurisdiction" (28a, 94a). But because the Court of Appeals sent down its mandate in 1968, reversing the District Court, there was no jurisdiction for the Court to "retain". Such is the precise holding of the Fifth Circuit in *Meredith v. Fair,* 306 F. 2d 374, 376 (5th Cir. 1962). The Second Circuit itself had reached the same conclusion earlier. *In re Nevada-Utah Mines & Smelters Corp.,* 204 Fed. 982, 983 (2d Cir. 1913).

The other ground upon which the Court asserted jurisdiction of the present appeal was defendants' notice of appeal pursuant to 28 U. S. C. § 1291 (89a, 94a). Other circuits are unanimous that class action determinations are not final orders, and are not subject to interlocutory appeal, absent certification under 28 U. S. C. § 1292(b). See, *e.g. Weingartner v. Union Oil Co. of California,* 431 F. 2d 26 (9th Cir. 1970) *cert. denied,* 400 U. S. 1000 (1971); *Walsh v. City of Detroit,* 412 F. 2d 226 (6th Cir. 1969) and *Hackett v. General Host Corp.,* 455 F. 2d 618 (3d Cir.), *cert. denied,* 407 U. S. 925 (1972). Except for the narrow "death knell" exception, the Second Circuit has itself consistently held that class action determinations are not appealable final

orders. *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F. 2d 770 (2d 1972); *Pfizer, Inc. v. Lord*, 449 F. 2d 119 (2d Cir. 1971); *Korn v. Franchard Corp.*, 443 F. 2d 1301 (2d Cir. 1971); *Caceres v. International Air Transport Ass'n.*, 422 F. 2d 141 (2d Cir. 1970); *City of New York v. International Pipe and Ceramics Corp.*, 410 F. 2d 295 (2d Cir. 1969). For the first time since the adoption of Rule 23, the *Eisen* decision squarely holds all class action determinations to be routinely appealable (94a). This erroneous jurisdictional holding invites a further and unnecessary increase in the caseload of the already burdened Courts of Appeals.

IV.

Neither Rule 23 Nor Due Process Precludes the District Court From Allocating the Cost of Notice Between the Parties, on the Basis of a Preliminary Evidentiary Hearing on the Plaintiff's Probable Success on the Merits.

The plaintiff's financial ability to furnish notice to the class is not included in Rule 23 as a prerequisite to maintenance of a class action, or even as a factor to be considered in deciding whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(c)(2), the only part of the Rule which requires the giving of notice, and which presupposes that an action has already been determined to be properly maintainable as a class action under 23(a) and (b), provides that the court shall direct notice to the class. It does not provide that the court shall direct the plaintiff to furnish the notice.

Numerous district court decisions have taken this to mean that it is proper to allocate the cost of notice between the parties. *Dolgow v. Anderson*, 43 F. R. D. 472 (E. D.

N. Y. 1968); *State of Minnesota v. U. S. Steel Corp.*, 44 F. R. D. 559 (D. Minn. 1968); *Bragalini v. Biblowitz*, 1969-1970 Fed. Sec. L. Rep. ¶ 92,537 (S. D. N. Y. 1969); *Berland v. Mack*, 48 F. R. D. 121 (S. D. N. Y. 1969); *Feder v. Harrington*, 52 F. R. D. 178, 184 (S. D. N. Y. 1970); *Miller v. Alexander Grant & Co.*, 1971-72 Fed. Sec. L. Rep. ¶ 93,287 (E. D. N. Y. 1971); *Mack v. General Electric Co.*, Civil Action No. 69-2653 (E. D. Pa., Order of September 7, 1971); *Lamb v. United Security Life Company*, 1971-1972 Fed. Sec. L. Rep. ¶ 93,489 (S. D. Iowa 1972); *Ostapowicz v. Johnson Bronze Co.*, 15 F. R. Serv. 2d 1249 (W. D. Pa. 1972).

In *Berland v. Mack, supra*, Judge Mansfield (then on the District Court) stated:

> "[W]e do not believe that Eisen established a hard and fast rule to the effect that the plaintiff must initially lay out the cost of notice. We have repeatedly been advised that flexibility is important to the proper application of Rule 23, Green v. Wolf Corporation, 406 F. 2d 291, 299 (2d Cir. 1968), and that considerable freedom must be allowed the trial judge who is saddled with the burdensome task of managing the class action. The decision as to how the cost of notice is to be allocated between the parties appears to be an appropriate area for exercise of our discretion, having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants." 48 F. R. D. at 131.

The decision of the Second Circuit has now established the inflexible rule that allocation is not permissible and

that a hearing to determine the propriety of allocation is not authorized by Rule 23.

Neither the defendants nor the panel questioned the right of the District Court to hold an evidentiary hearing to establish the ability to identify individual class members. Indeed, in its prior decision, the Court of Appeals directed the district court to hold an "evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper" (28a). Since Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances . . ." it is anomalous to hold that a hearing is proper on one aspect, i.e., what is the best notice practicable, but not on another, i.e., on whom the burden of the court's direction should fall.

Defendants were given a hearing on the cost of notice, with full opportunity to present evidence. Due process requires only the right to be heard. *Fuentes v. Shevin*, 407 U. S. 67 (1972). At such a hearing, the plaintiff need only establish the probable validity of his claim. Id. at 97; *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 343 (1969). Moreover, due process ". . . tolerates variances in the form of a hearing, 'appropriate to the nature of the case', *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 313 . . ." *Fuentes v. Shevin, supra*, 407 U. S. at 82.

CONCLUSION.

For the reasons stated above, this Honorable Court should grant the petition for a writ of certiorari to review the issues raised therein on the merits. Alternatively the Court should grant the petition, in order to remand the case for consideration by the Court of Appeals in banc.[8]

Respectfully submitted,

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8. *United States ex rel. Robinson v. Johnson,* 316 U. S. 649 (1942).

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX TO APPENDIX.

Opinion of United States Court of Appeals for the Second Circuit Dated December 19, 1966 (Waterman, Moore and Kaufman, Circuit Judges) Denying Defendants' Motion to Dismiss Appeal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1966

(Argued December 12, 1966 Decided December 19, 1966)

Docket No. 30934

[SAME TITLE]

KAUFMAN, Circuit Judge:

The sole question presented by this motion is whether appellant may take an appeal from an order of the district court dismissing his class action, but permitting him to litigate his individual claims.

Morton Eisen brought an action in the district court alleging that two major "odd-lot" dealers on the New York Stock Exchange—Carlisle & Jacquelin and DeCoppet & Doremus—had conspired and combined to monopolize odd-lot trading, and had charged excessive fees, in violation of the Sherman Act. 15 U.S.C. §§1, 2. Specifically, he challenged the so-called "odd-lot differentials" charged by the appellee and other odd-lot dealers for transactions involving other than 100 share lots of securities. The complaint also charged the New York Stock Exchange with having breached its duties, allegedly proscribed by the Securities

Exchange Act of 1934, concerning suspension of odd-lot trading. 15 U.S.C. §§78f(b), 78f(d), 78s(a).

Eisen sued both for himself and on behalf of all odd-lot purchasers and sellers on the Exchange. Appellees moved to dismiss the class action, alleging that it was not maintainable under amended Rule 23(c)(1) of the Federal Rules of Civil Procedure. Judge Tyler granted the motion and dismissed the class action, but did not dismiss Eisen's individual claims or pass on their merits.

It is too clear for discussion that all orders are not appealable. 28 U.S.C. §1291 provides that the courts of appeals have jurisdiction of appeals from all "final" decisions of the district courts, while 28 U.S.C. §1292 permits appeals from a narrowly limited class of interlocutory orders. But as the Supreme Court has commented, "[A] decision 'final' within the meaning of §1291 does not necessarily mean the last order possible to be made in a case." Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964). The question presented to us, therefore, is whether Judge Tyler's order dismissing the class action falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

In making this determination, Justice Douglas' language in the *Gillespie* case is instructive:

> [I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality be given a *"practical rather than a technical construction."* • • •

> [I]n deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-53 (emphasis supplied).

In the present case, these considerations, rather than being "competitive," lead to a single conclusion—that the order dismissing this class action is appealable. The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order "if unreviewed, will put an end to the action." Chabot v. National Securities and Research Corp., 290 F. 2d 657, 659 (2d Cir. 1961). We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. See Escott v. Barchris Constr. Corp., 340 F. 2d 731, 733 (2d Cir.), *cert. denied sub nom.* Drexel & Co. v. Hall, 382 U.S. 816 (1965). If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23.

There are, therefore, most compelling reasons to deny this motion to dismiss the appeal; and permitting Eisen to proceed in no way conflicts with any precedents of this Court. Appellees rely on Oppenheimer v. F. J. Young & Co., 144 F. 2d 387 (2d Cir. 1944), but that decision was reached before the Supreme Court spoke in *Cohen, supra.* While it is true that in Lipsett v. United States, 359 F. 2d 956 (2d Cir. 1966), we did not permit an appeal from the dismissal of a class action, we reached that conclusion because the facts did not come within the framework of the *Cohen* doctrine; the plaintiffs lacked standing, and dismissal of the class action allegations, we said, merely "prettified" the pleadings since the action could still continue.

Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will, for all practical purposes terminate the litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed. See Roberts v. U.S. District Court, 339 U.S. 844 (1950); *Chabot* v. *National Securities and Research Corp., supra.*

Motion denied.

Opinion of United States Court of Appeals for the Second Circuit Dated March 8, 1968 (Medina and Hays, Circuit Judges) Reversing, Remanding and Retaining Jurisdiction, and Dissenting Opinion of Chief Judge Lumbard

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 78—September Term, 1967.

(Argued November 6, 1967 Decided March 8, 1968.)

Docket No. 30934

[SAME TITLE]

MEDINA, Circuit Judge:

On this appeal we are presented with significant questions involving the interpretation of recently amended Rule 23 of the Federal Rules of Civil Procedure. Morton Eisen instituted this action seeking damages and injunctive relief on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange against Carlisle & Jacquelin and DeCoppet & Doremus, alleging that the two brokerage firms had combined and conspired to monopolize odd-lot trading, and had fixed the odd-lot differential at an excessive amount in violation of the Sherman Act. 15 U.S.C. Sections 1, 2. A third count alleged that the defendant New York Stock Exchange had failed to discharge its duties under the Securities Exchange Act of 1934 by neglecting to adopt rules protecting investors in odd-lots. 15 U.S.C. Sections 78f(b), 78f(d), 78s(a).

Following a motion by defendants for a determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, Judge Tyler held that the suit could not be

brought as a class action. *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966). A motion to dismiss the present appeal because the decision below constituted a non-final order has previously been denied by this Court. *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), *cert. denied* 386 U.S. 1035 (1967). In dismissing the class action the District Court found that plaintiff failed to demonstrate that he would be able fairly and adequately to protect the interests of the class, Fed. R. Civ. P. 23(a)(4); that the notice required by due process and the rule, Fed. R. Civ. P. 23(c)(2), could not be given and that questions common to the class did not predominate over questions affecting individual members. Fed. R. Civ. P. 23(b)(3).

At the outset, it is necessary briefly to describe the mechanics of odd-lot trading on the New York Stock Exchange. The regular unit of trading on the Exchange is the "round lot" of 100 shares. An "odd-lot" is the term used to designate transactions involving less than 100 shares. Odd-lot orders do not form part of the "regular auction market" but are exclusively handled by special odd-lot dealers who buy and sell for their own account as principals. In order to purchase or sell an odd-lot an individual first contacts a brokerage firm which then places an order with the odd-lot dealer. The cost to the customer includes both a standard commission payable to the brokerage firm and the odd-lot differential which is received by the odd-lot dealer. The differential is a figure amounting to a fraction of a point for each share traded, which is added to the customer's purchase price and deducted from the sale price. During the period of time in which plaintiff had alleged he was involved in the odd-lot market, covering the years 1960-1966, the differential was ⅛th of a point (12½ cents) per share on stock selling below $40 per share and ¼ of a point (25 cents) per share on stock selling at $40 or above per

share.[1] Over the years odd-lot trading has accounted for a fairly steady percentage of the total volume on the Stock Exchange, ranging from a high of 12.9% in 1937 to a low of 7.9% in 1950 and 1958. For example, recent figures indicate that in 1961 the volume of odd-lot transactions totaled 214,018,834 shares. SEC, Report of Special Study of Securities Markets, H. R. Doc. No. 95, Pt. 2, 88th Cong. 1st Sess. 171-202, 393 (1963), hereinafter cited as SEC Special Study. Defendants Carlisle & Jacquelin and De-Coppet & Doremus are engaged exclusively in odd-lots and collectively they handled 99% of the volume in odd-lot transactions. SEC Special Study at 172. Various alleged abuses in odd-lot trading disclosed by the SEC in 1963, form, in large part, the basis of the present action. See SEC Special Study at 171-202.

I.

Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. Nevertheless, Rule 23 of the Federal Rules of Civil Procedure, as it was originally enacted, did not effectively achieve either of the above two objectives. Class actions were divided into various categories reflecting the "jural relationships of the members of the class." See 3 Moore, Federal Practice par. 23.08 at 3434 (2d ed. 1953). Only after a determination of the nature of the rights: "joint, common or secondary" in the true class action, "several related to specific property" in the

1. The above figures do not reflect the change made in the differential which was effective as of July 1, 1966. Subsequent to that time the so-called "breakpoint" was raised to $55, with the differential amounting to ⅛th of a point on stock sold below that figure and ¼ of a point on stock sold above it.

hybrid class action, and "several affected by a common question and related to common relief" in the spurious class action, was a court able to proceed. Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98 (1965), hereinafter cited as Advisory Committee's Note. There were significant differences in the *res judicata* effects accorded to the various class actions. Thus while a judgment in a true class action was binding on the entire class, the spurious class action only concluded the rights of parties. 3 Moore, Federal Practice par. 23.11 at 3472 (2d ed. 1953). Since the great majority of cases fell into this latter category, the objective of determining all questions in one suit was effectively frustrated. In essence, the spurious class action was interpreted as merely a permissive joinder device.[2] See *Carroll* v. *American Federation of Musicians*, 372 F. 2d 155 (2d Cir. 1967); *Fox* v. *Glickman Corp.*, 355 F. 2d 161 (2d Cir. 1965), *cert. denied* 384 U.S. 960 (1966); *Nagler* v. *Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957); *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). But see *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941) (dictum).

To avoid the problems associated with the original rule the Advisory Committee on the Rules of Civil Procedure has completely redrafted Rule 23 in order to provide a thoroughly flexible remedy. Throughout the course of a proceeding courts are given complete control to give assurance that the procedures adopted are fair, reasonable and effective. All actions will result in judgments binding on the entire group of individuals found by the court to be members of the class. Fed. Rule C. P. 23(c)(3). While the new concepts incorporated in the rule have not as yet been

2. There was a serious split in court decisions on the subject of the permissibility of "one-way intervention." Under this procedure, absent class members in a spurious action were permitted to intervene after a favorable judgment, while at the same time they were not bound by an unfavorable decision. Advisory Committee's Note at 105.

passed upon by any federal Court of Appeals,[3] they have received somewhat less than an enthusiastic reception in the District Courts. Compare *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967), expressing grave doubts about the propriety of a rule which binds absent but described class members, with *Siegel* v. *Chicken Delight Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967) which upholds a class action brought by 5 franchise dealers on behalf of a class of over 700 dealers, alleging anti-trust violations. Nevertheless, the majority of courts have upheld the validity of representative actions brought under the new rule. See, e.g., *Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125 (S.D.N.Y. 1966); *Fischer* v. *Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966); *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966); *Brennan* v. *Midwestern United Life Insurance Co.*, 259 F. Supp. 673 (N.D. Indiana 1966); *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967). But see *Richland* v. *Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967); *Hohmann* v. *Packard Instrument Co.*, 43 F.R.D. 192 (N.D. Ill. 1967); *Jacobs* v. *Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D.N.Y. 1967); *Berger* v. *Purolator Products, Inc.*, 41 F.R.D. 542 (S.D.N.Y. 1966). Although representing a totally different approach to class actions, the new rule does retain two standards which were embodied in the old rule, namely, the class must be so numerous as to make it impracticable to bring every member before the court, and the representative party must be able fairly and adequately to protect the interests of the entire class. Necessarily the old case law will furnish some guidance in defining these concepts.

3. The Fifth Circuit has on two occasions been presented with issues under the new rule. However, each of these cases involved aspects of class actions which are similarly handled under both the original and the amended rule 23. In one case the 5th Circuit held that claims could not be aggregated under the new rule to meet the jurisdictional amount in a suit which formerly would have been classified as a spurious action. *Alvarez* v. *Pan American Life Ins. Co.*, 375 F. 2d 992 (5th Cir. 1967). The other case involved a routine denial of a class action because the representative and the class members had conflicting interests in the subject matter of the suit. *Anderson* v. *Moorer*, 372 F. 2d 747 (5th Cir. 1967).

Opinion of United States Court of Appeals

II.

To be maintainable as a class action a suit must meet all the requirements set forth in Section 23(a)[4] and also fall within one of the subsections of 23(b).[5]

4. "Rule 23. *Class Actions*

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

5. "(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatable standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Plaintiff has alleged that he was engaged in odd-lot trading during the years 1960-1966. Though estimates of the number of class members similarly engaged in this activity during those years have varied, all the litigants concede "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Defendants' "rough" approximation, not disputed by plaintiff, would place 3,750,000 individual and corporate buyers and sellers of odd-lots in the class. Similarly, the allegation that a conspiracy, whose object was to charge excessive rates on odd-lot transactions existed between the two brokerage firms, satisfies the requirement that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Furthermore, plaintiff's claim is "typical of the claims * * * of the class." Fed. R. Civ. P. 23(a)(3). Although there are varying fact patterns underlying each individual odd-lot transaction, the same allegedly unlawful differential is charged to all buyers and sellers. However, defendants have argued that different members of the class will have varying theories as to what constitutes the "excessive price," and other class members may be satisfied with the present price policy.[6] Nonetheless, all members of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive.

6. For example, defendants maintain that a purchaser of an odd-lot at a cost below the "breakpoint" figure might urge that the differential be revised for the benefit of his class (stock selling at $40 or above) at the expense of the other class (stock selling below $40). However, plaintiff, as demonstrated by his answers to interrogatories, has purchased stock at prices both above and below the prevailing breakpoint. It seems farfetched to argue that plaintiff will adopt a position detrimental to his own interest. If plaintiff does pursue a self-defeating course of conduct, the class action may then be dismissed on the ground that he has failed adequately to represent the entire class. The court is also empowered to divide the present class into appropriate sub-classes. Fed. R. Civ. P. 23(c)(4).

Inability on the part of the plaintiff to "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), was considered by the District Court to be one of the primary reasons for dismissing the class action. We believe the court employed incorrect standards in reaching this result.

Since Eisen had not alleged with specificity the nature of his various odd-lot transactions, the court below felt it lacked sufficient information properly to assess his qualifications as a representative, and, even if such information were alleged, "the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation." *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 150 (S. D. N. Y. 1966). The District Judge also felt it was impossible to assume that plaintiff "alone with a comparatively minuscule and limited interest in odd-lot transactions" could represent a class numbering at least in the hundreds of thousands, which encompassed individuals with much larger and different interests. *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 151 (S. D. N. Y. 1966).

Traditionally, courts have expressed particular concern for the adequacy of representation in a class suit because the judgment conclusively determines the rights of absent class members. See *Hansberry* v. *Lee*, 311 U. S. 32 (1940). Of course, understandably, the standards for representation under the old spurious class action were not as rigorously enforced, due to the minimal *res judicata* effects given to the judgments in these suits. See *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). However, as a result of the sweeping changes in Rule 23, a court must now carefully scrutinize the adequacy of representation in all class actions.

What are the ingredients that enable one to be termed "an adequate representative of the class?" To be sure, an

essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class. See *Hansberry* v. *Lee*, 311 U. S. 32 (1940). Courts, on occasion, have also required that the interest of the representative party be co-extensive with the interest of the entire class, but this amounts to little more than an alternative way of stating that the plaintiff's claim must be typical of those of the entire class, an element we have already discussed. See *Richland* v. *Cheatham*, 272 F. Supp. 148 (S. D. N. Y. 1967). However, we believe that reliance on quantitative elements to determine adequacy of representation, as was done by the District Court, is unwarranted. Language to the effect that a small number of claimants cannot adequately represent an entire class has frequently been cited, see, e.g., *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629 (7th Cir.), *cert. denied* 311 U. S. 700 (1940), but we fail to understand the utility of this approach. If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed. As has previously been stated, one of the primary functions of the class suit is to provide "a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731, 733 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1966). Individual claimants who may initially be reluctant to commence legal proceedings may later join in a class suit, once they are assured that a forum has been provided for the litigation of their claims. See *Siegel* v. *Chicken Delight Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967). But to dismiss a

class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation, *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731, 733 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1966), and that the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.

We are not persuaded that it is essential that any other members of the class seek to intervene. Absent class members will be able to share in the recovery resulting in the event of a favorable judgment, and, if they wish to avoid the binding effect of an adverse judgment they may in various ways and at various times that we need not now attempt to particularize, attack the adequacy of representation in the initial action or disassociate themselves from the case. *Hansberry* v. *Lee*, 311 U. S. 32 (1940); see Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 436 (1960). If we have to rely on one litigant to assert the rights of a large class then rely we must. The dismissal of the suit out of hand for lack of proper representation in a case such as this is too summary a procedure and cannot be reconciled with the letter and spirit of the new rule.

Necessarily, a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation, see *Hess* v. *Anderson, Clayton & Co.*, 20 F. R. D. 466 (S. D. Cal. 1957), but the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class

considers his representation adequate. Nor can silence be taken as a sign of disapproval.[7]

It is also worthy of note that the rule contains provisions which, by themselves, are designed to insure proper representation. For example, 23(e) requires court approval of a settlement, thus minimizing the danger that the rights of the class will be unfairly compromised. Accordingly, we decide that the District Court should reconsider the adequateness of plaintiff's representation in the light of the standards which we have set forth in this opinion.[8]

III.

In addition to complying with the requirements of Section (a) of Rule 23, a potential class action must also satisfy the requirements of one of the three subsections of 23(b).[9] Plaintiff has argued that the present action is maintainable under all three subsections of 23(b). However, we believe both 23(b)(1)(A)[10] and 23(b)(2) are not applicable to the present factual situation. Subsection

7. At various points in its commentary the Advisory Committee has referred to an article written by former Professor (now Judge) Jack B. Weinstein. In speaking of the adequacy of representation question Weinstein has said: "A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights. * * * The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice." Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 460 (1960).

8. Inadvertently the court below did not notice that plaintiff, in answer to interrogatories, specifically listed his transactions in odd-lots. His damages were estimated at $70.

9. See footnote 5, *supra*.

10. Plaintiff does not now claim that 23(b)(1)(B) is applicable.

(b)(1)(A) authorizes a class action if "the prosecution of separate actions by or against individual members would create a risk of * * * inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Plaintiff has effectively rebutted his own argument because he admits that individual actions could not be brought as the small claimants who constitute the entire class could not, on an individual basis, afford the expense of lengthy anti-trust litigation. Under these circumstances there is little danger that individual suits will establish "incompatible standards of conduct" for the defendants. Subsection (b)(2) was never intended to cover cases like the instant one where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory. Advisory Committee's Note at 102.

We must also note that plaintiff's effort to qualify the action under 23(b)(1) and 23(b)(2) was induced by his erroneous theory that notice is not "mandatory" under these sections. This theory is based on the assumption that 23(c)(2)[11] provides the only "mandatory" notice required by the new rule. Since this particular section refers exclusively to actions brought under 23(b)(3), other suits cognizable under either 23(b)(1) or 23(b)(2) would only

11. Rule 23(c)(2):

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

be subject to "discretionary" notice under 23(d)(2).[12] Nevertheless, we hold that notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Advisory Committee's Note at 107.

Ultimately plaintiff must fall back on subsection (b)(3), which in effect corresponds to the old spurious class action. Presumably influenced by the same thinking which relegated the old spurious class action to the position where it was used primarily as a device for permissive joinder, the Advisory Committee has commented that "class action treatment is not as clearly called for [in (b)(3) situations] but it may nevertheless be convenient and desirable depending upon the particular facts." Advisory Committee's Note at 102. A court, under this subsection, is thus required to find that the questions of law or fact common to the class predominate over questions affecting individual members and that the class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Moreover, resolution of the issue concerning the propriety of a suit under 23(b)(3) involves an assessment of various factors, including among others, "(A) the interest of members of the class in individually controlling the prosecution or defense

12. Rule 23(d):

"(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; * * *."

of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and "(D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

The District Court felt "the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation" and the "varied nature and quantum of the interests of other odd-lot purchasers and sellers" necessarily compelled a finding that questions affecting individual members predominated over questions common to the entire class. *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

However, under both the old and the amended rule 23, anti-trust violations practised upon large groups of individuals have been held to involve sufficient common questions of law or fact to merit treatment as class actions. *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d 737 (7th Cir.), *cert. denied* 344 U.S. 820 (1952) (old rule); *City of Philadelphia* v. *Morton Salt Co.*, 248 F. Supp. 506 (E.D. Pa. 1965) (old rule); *Siegel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967) (new rule); but see *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967) (new rule). The Advisory Committee has specifically noted that "concerted anti-trust violations may involve" predominantly common questions. Advisory Committee's Note at 103. Suits alleging violations of Section 10(b) of the Securities Exchange Act, though often involving separate consideration of the elements of misrepresentation and reliance as they affect individual members, have also been accorded treatment as class actions under the new rule. *Fischer* v. *Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966); *Kronenberg* v. *Hotel Gov-*

ernor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966); *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (N.D. Indiana 1966); but see *Berger* v. *Purolator Products, Inc.*, 41 F.R.D. 542 (S.D.N.Y. 1966).

We realize that members of the proposed class might have had different motives when they entered into the odd-lot market.[13] We are also mindful of the fact that there may be a wide variety of orders some of which may require special handling by the odd-lot dealer.[14] Nevertheless, the alleged underlying conspiracy does contain a so-called "common nucleus of operative facts." *Siegel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967). All of these differences among the class members bear only on the computation of damages, a factor which, by itself, does not justify dismissal of the class action. *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F. R. D. 42 (S. D. N. Y. 1966); *City of Philadelphia* v. *Morton Salt Co.*, 248 F. Supp. 506 (E. D. Pa. 1965). Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule gives a court the power to divide the class into appropriate subclasses or to require the members to bring individual suits for damages. Fed. R. Civ. P. 23(c)(4); Advisory Committee's Note at 106. Even if individual questions arise during the course of litigation, which render the action "unmanageable," the court still has the power at that time to dismiss the class action and permit the plaintiff to proceed only on behalf of himself. Fed. R. Civ. P. 23(c)(1). Therefore, at this early stage of the proceedings, we find there has been an adequate demonstra-

13. For example defendants have referred to the different motives present in the following class members: investors, traders, speculators and arbitrageurs.

14. Defendants have listed 20 different types of orders including, among others, varying forms of limit orders, contingent orders and market orders.

tion that common questions of law or fact predominate over individual questions. See *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F. R. D. 42 (S. D. N. Y. 1966).

Before allowing a suit to proceed under 23(b)(3) the trial court must also find that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." Although defendants argue that intervention and permissive joinder[15] are both superior to a class action, implicit in Judge Kaufman's prior opinion above referred to, denying defendants' motion to dismiss the appeal for lack of jurisdiction, is the assumption that the only feasible way to litigate these claims is by a class action.[16] The odd-lot differential payable on any one transaction under the rate schedule in effect at the time the complaint was filed ranged from 12½ cents to $24.75.[17] Plaintiff engaged in 47 odd-lot transactions between 1960 and 1966 paying a total of $259 in odd-lot differentials. Recognizing the nature of the odd-lot differential and the type of investors who often engage in these transactions, we think it highly unlikely that any one potential plaintiff would have

15. In one of the first articles criticizing old Rule 23 joinder was described as a situation which "presupposes the prospective plaintiffs advancing en masse on the courts." Surely that is not the case in the instant action. Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago L. Rev. 684 (1941).

16. "Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, * * * it will for all practical purposes terminate the litigation." *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119, 121 (2d Cir. 1966), *cert. denied* 386 U. S. 1035 (1967). Judge Kaufman had assumed that $70 would be a reasonable estimate of plaintiff's damages. "We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen." *Eisen* v. *Carlisle & Jacquelin*, *supra* at 120.

17. Thus the minimum figure would apply where the transaction involves one share of stock selling for a price under $40. The maximum figure would apply where the transaction involved 99 shares selling for a price of $40 or above.

sustained sufficient damages to warrant, as a practical matter, individual prosecution of his claim.[18] Thus the present case appears to fall within that class of cases in which "the interests of individuals in conducting separate lawsuits" are more "theoretic than practical" since "the amounts at stake for individuals (are) * * * so small that separate suits would be impracticable." Advisory Committee's Note at 104. This belief is reinforced by the fact that there is no other pending litigation dealing with the subject matter of this suit. In any event, we are bound by Judge Kaufman's ruling as the law of this case.

Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations,[19] we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them. Concededly, the damages for individual class members will be small and the possibility remains that the amount expended on the paper work which would be necessary in order to file and prove a claim may exceed the amount of damages sustained. On the other hand, courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago

18. The possibility, as suggested by defendants, that a court may grant attorney's fees in excess of the damages awarded does not provide a meaningful alternate. It is unlikely that a plaintiff with a small claim will undertake complex anti-trust litigation on the remote possibility that a court may award anything like compensatory attorney's fees.

19. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago L. Rev. 684 (1941); Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433 (1960); Frankel, Amended Rule 23 From a Judge's Point of View, Symposium on Amended Rule 23, 32 A. B. A. Antitrust L. J. 251, 295-98 (1966).

L. Rev. 684, 686 (1941).[20] Moreover, in the present case there is apparently no public administrative body that could ensure repayment, so the responsibility must ultimately rest on the judicial system. See Comment, Recovery of Damages in Class Actions, 32 Univ. of Chicago L. Rev. 768, 785 (1965).

Before allowing the suit to proceed, a further inquiry by the District Court is necessary in order to consider the mechanics involved in the administration of the present action. Defendants may be able to present data indicating that in analogous situations large sums have been absorbed by paper work, fees of Special Masters, printing, postage and so on. Procedures should be outlined with regard to possible intervention by other class members and provisions made for the filing of claims. The court should explore the problems which individual class members would be likely to encounter in filing and proving their claims. If as a practical matter class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue. There may conceivably be questions of jurisdiction or venue, as well as of demands for a jury trial.

In view of the arguments previously discussed relating to the necessity for separate computation of damages because of the variety of services performed by the defendant-dealers, it is not inconceivable that the District Court on remand may conclude that these separate questions present insuperable problems of judicial administration sufficient to justify the dismissal of the action.[21] However, we do not

20. Reference is made by Kalven & Rosenfield to the Illinois Bell Telephone Co. rate case where extensive litigation resulted in the actual distribution of about $17,000,000. Over 85% of the claims were for less than $25 and refunds were made to more than a million people. See *Illinois Bell Telephone* v. *Slattery*, 102 F. 2d 58 (7th Cir.), *cert. denied* 307 U. S. 648 (1939).

21. As previously discussed, it would also be possible to order separate consideration of the question of damages.

express any opinion on this subject and we simply note that other courts in similar cases have been able to set up formulas of procedure for recovery that are applicable to an entire class. See, e.g., *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *petition for cert. dismissed* 371 U. S. 801 (1962). The court may also find that it is too early in the proceedings adequately to determine potential damage questions and hence that a decision on the propriety of a class action may have to be postponed.

IV.

The notice requirement of 23(c)(2), as recognized by Judge Tyler, presents what may turn out to be the most serious obstacle to the maintenance of the present action. Subsection 23(c)(2) provides:

> "In any class action maintained under (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion, may, if he desires, enter an appearance through his counsel."

The District Judge held that "both the Rule and concepts of due process require individual notice for the class members who can be identified." *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 151 (S. D. N. Y. 1966). As a result of "practical financial limitations" present in the instant case, he was of the opinion that the notice requirement could not be met. Publication plus the mailing of individual no-

tice to stock exchange member firms was rejected as a possible alternative method.

While the Supreme Court has recognized that class actions represent an exception to the general rule under which only parties are bound by a judgment, the procedure adopted must conform to the requirements of due process and fairly insure the protection of absent parties who are to be bound. *Hansberry* v. *Lee*, 311 U. S. 32, 42 (1940). Notice, as an integral part of due process must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). The Advisory Committee in its note has suggested that the mandatory notice pursuant to 23(d)(2)[22] were intended to fulfill the requirements of due process established in *Hansberry* and *Mullane*. Advisory Committee's Note at 107. The Advisory Committee also sought to ensure that individual interests would be respected in (b)(3) cases by giving class members the opportunity to avoid being bound by the judgment if they requested exclusion and so informed the court.

The task of furnishing notice to the class members in such a case as this must rest upon the representative party when he is the plaintiff.[23] Appellant has argued that mail notice to the entire class would cost approximately $400,000, and, therefore, must be deemed impracticable within the

22. See footnote 12, *supra*.

23. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 398 (1967); Frankel, Amended Rule 23 From a Judge's Point of View, Symposium on Amended Rule 23, 32 A. B. A. Antitrust L. J. 251 at 300. We fail to see any support for the position adopted in *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E. D. Pa. 1967) that the court itself has the burden of sending out the proper notice.

context of 23(c)(2). Consequently, a decision requiring such notice would effectively foreclose all opportunity to secure relief. Plaintiff contends that publication is "the best notice practicable under the circumstances." On the other hand, defendants suggest that cost considerations should not prevent many class members from receiving the individual notice they are entitled to both by the requirements of due process and by the terms of 23(c)(2), since their identities are "very easily ascertainable." *Schroeder* v. *City of New York*, 371 U. S. 208 (1962).

The District Courts have been inconsistent in their interpretations of the notice requirement under the new rule. One opinion reads 23(c)(2) as requiring that actual notice be given to all absent class members, *Richland* v. *Cheatham*, 272 F. Supp. 148 (S. D. N. Y. 1967), while another has permitted a representative to use notice by publication to inform an entire class in a taxpayer's suit. *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465 (N. D. Ill. 1967). See also *Harris* v. *Jones*, 41 F. R. D. 70 (D. C. Utah 1966), requiring individual notice to be given to 1500 class members in an action for violation of Rule 10b-5 of the Securities Exchange Act because all the names and addresses were on file and available.

On the record before us we cannot arrive at any rational and satisfactory conclusion on the propriety of resorting to some form of publication as a means of giving the necessary notice to all members of the class on behalf of whom the action is stated to be commenced and maintained. But we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice. Not only did the court below fail to analyze and give proper consideration to the standards set forth in 23(c)(2); there was also a lack of evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c)(2) to which reference has already been made.

Can any members of the class be identified through reasonable effort so that such persons may be given individual notice? Without an evidentiary hearing we do not see how this question can be answered. And, until it is answered, how is one to give any rational consideration to the question of what notice by publication would be deemed appropriate, what should be stated in the notice, and who is to take on the burden of answering the large number of written and oral inquiries by members of the class?

The affidavits before us are conclusory in character and they merely scratch the surface. For example, a general partner in Carlisle & Jacquelin in his affidavit states that there is no way in which his firm could identify the odd-lot customers.[24] Similarly, a general partner in a large member firm on the New York Stock Exchange declares that there is no ready way to separate odd-lot customers from round lot customers and that to determine which customers had odd-lot transactions in recent years would require sorting of approximately 300,000 to 400,000 names of customers.[25] Finally a general partner in another large member firm expresses his belief that there is no way of obtaining exact information about odd-lot transactions without analyzing the history of each account, a task which would be "virtually impossible."[26] Nevertheless, both on argument and as part of their briefs, defendants have argued that "many (odd-lot customers) can, in fact be identified through the appellee firms and the brokerage houses."

On remand the court may find that the names of certain class members, because of their widespread dealings in odd-lots, may be readily ascertainable. Arguably these class members may possess enough of a stake in the proceedings

24. Affidavit of Sander Landfield, general partner of Carlisle & Jacquelin, offered in support of motion to dismiss class action.

25. Affidavit of Dean Witter, Jr., general partner in Dean Witter & Co., offered in support of motion to dismiss class action.

26. Affidavit of Edwin B. Peterson, general partner in Francis I. du Pont & Co., offered in support of motion to dismiss class action.

to justify personal intervention. At this point the court will then have to consider once again the question of publication. Under certain circumstances published notice may amount to the "best notice practicable," particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated. In this connection we must note that in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the party required to furnish individual notice was a large banking institution and not a small individual claimant. Similarly, in other cases publication has been rejected as insufficient notice where it was sought to be used by the City of New York, *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), the New Haven Railroad, *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953) and the City of Hutchinson, Kansas, *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956). Nevertheless, if the court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit.

It may be that in some situations it is better at the outset to decide that the proceeding may be prosecuted as a class action and leave for later resolution some of the debatable matters, such as the efficiency of the representation or the notice to be given, or the feasibility of meeting problems of judicial administration. In this particular case, with its millions of possible claimants, we think it would be most amiss to let the case go ahead until it becomes hopelessly entangled in a mass of procedural detail and expense from which it may not be easy or even possible to extricate it with justice to the parties by the simple means of deciding at a later day that the order permitting the case to proceed as a class action was improvidently granted.

Finally, it is worthy of note that in dismissing the action as one including "a myriad of complex, frustrating, need-

less problems in attempted management" the District Court in *School Dist. of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1006, commented that, prior to the dismissal there had been "numerous hearings and conferences."

Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper.

LUMBARD, *Chief Judge* (dissenting):

It seems to me that we should affirm Judge Tyler's ruling that this is not a proper class action because it is so clearly right on two counts: the impossibility of the plaintiff giving suitable notice and the unmanageability of this suit as a class action. I would not remand to the district court to do the obvious and the unnecessary.

What could be less of a class action than a suit where there are more than 3,750,000 potential plaintiffs living in every state of the union and in almost every foreign country? If this is a "class," it is so large and indiscriminate that a substantial proportion of its membership will have no idea whatever that they belong to it. Just how a notice can be worded which could alert so large a "class" to the possibility that proceedings in the Southern District, if carried forward, would someday enrich each one by a few dollars, if there be anything left after expenses and attorneys' fees, is a mystery to me.

Indeed, the question of how to give any notice which would be sufficient to meet constitutional requirements is so impossible of solution that my colleagues choose to ignore it.

If the plaintiff, who has participated in some 247 [corrected by Lumbard on 3/13/68] transactions over a period of years, estimates his damages at only $70, is it not evident that the overwhelming majority of all possible plaintiffs would expect at best to receive considerably less than $70? And what is sufficiently interesting about the expectation of such a recovery, available if at all, only after several years of litigation, to lead us to suppose that any considerable number would bother to respond to the notice. Despite articles in the May 3, 1966 edition of the New York Times and the May 4, 1966 edition of the Wall Street Journal no one has joined Eisen in this action. See *Berger* v. *Purolator Products*, 41 FRD 542, 544 (SDNY 1966). Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them.

In any event, plaintiff suggests no way in which he can give notice to his 3,750,000 potential brothers-in-litigation which could conceivably attract the attention of any appreciable number of them. Who is to advise foreign class members who do not read or understand English, and how is this to be done? Who is to pay for class notice, and for the subsequent notice of any step in the action which the Rule says must be given?

To me, these illustrations of the practical and insurmountable difficulties that would be encountered in administering this action as a class suit underscore that Judge Tyler could only have exercised his discretion as he did. As a class action the claim is totally unmanageable. See *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 11 FR Serv. 2d 23.b.3, Case 1, 23.b.3-3 (E.D. Pa. April 24, 1967).

Even if all of the difficulties inherent in the administration of the suit were overcome, the amount expended in filing and processing claims would probably exceed any recovery. *Illinois Bell Telephone* v. *Slattery*, 102 F. 2d 58 (7th Cir.), cert. denied, 307 U.S. 648 (1939) is inapposite.

In that case the telephone company had sought an interlocutory injunction against an Illinois Commerce Commission order requiring reduction of certain of its rates. The interlocutory injunction was granted, conditioned upon an undertaking by the telephone company to refund to its subscribers any sums paid by them in excess of the proposed reduced rates should the company lose its suit. The company had already collected the money and had laid it aside. The Supreme Court eventually ordered the injunction dissolved and that refunds be made in accordance with the terms of the injunction. *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U.S. 151 (1934). The telephone company agreed to undertake the task of making refunds and to assume the costs of the distribution. The payments were not made by the Court, but by the company under the supervision of a representative of the court. 102 F. 2d at 61.

In this case, unlike *Slattery,* the potential claimants have no direct business dealings with the parties which plaintiff seeks to hold liable, and therefore defendants are in no position to identify from their own records the potential claimants, let alone calculate the amounts of any refund that they may be found entitled to receive.

Here no one can ascertain whether any recovery will be due any particular plaintiff until the case has been litigated, and, if any recovery is decreed, there must follow an enormous number of calculations regarding the dealings of each plaintiff who is entitled to any recovery. And even after that the court would have to pass upon the expenses and fees to be deducted from any recovery.

Class actions were not meant to cover situations where almost everybody is a potential member of the class. Nor were they ever intended to compel any court to entertain an alleged controversy with so many potential parties, or to compel any court to entrust the interests of numerous plaintiffs to representation by one plaintiff whose interest is all of $70. Rule 23(b)(3) requires that a class action

be superior to other available methods for the fair and efficient adjudication of the controversy, and requires that the court consider "the difficulties likely to be encountered in the management of a class action" in making its determination. See *Berley* v. *Dreyfus & Co.*, 11 FR Serv. 2d 23.b.3, Case 6 (SDNY Dec. 22, 1967). While this court has determined that dismissal of the class action "will for all practical purposes terminate the litigation," 370 F. 2d at 121, Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. As the Advisory Committee's Note suggests, "one or more actions agreed to by the parties as test or model actions may be preferred to a class action * * *" If plaintiff's case has any merit and his counsel are of excellent calibre, as he asserts, I see no insuperable barrier to organization by plaintiff, with the assistance of counsel, of a group of members of the purported class to sponsor this litigation as a test case with Mr. Eisen as the sole plaintiff. Even if a test case is not financially expedient from the viewpoint of plaintiff and his legal advisors, its obvious administrative advantages compel me to reject the unmanageable class action as an alternative. See *Richland* v. *Cheatham*, 11 FR Serv. 2d 23.a.52, Case 2, 23.a.52-12 (SDNY July 27, 1967).

Even if plaintiff is unable to maintain an action, when a controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the Commission will take appropriate action.

The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action.

Opinion of Tyler, J., Dated April 7, 1971 Providing That Action May Be Maintained as a Class Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Mordecai Rosenfeld, Esq., New York City, for Plaintiff.

Carter, Ledyard & Milburn, Esqs., New York City, for Defendant Carlisle & Jacquelin.

Kelley, Drye, Warren, Clark, Carr & Ellis, Esqs., New York City, for Defendant DeCoppet & Doremus.

Milbank, Tweed, Hadley & McCloy, Esqs., New York City, for Defendant New York Stock Exchange.

TYLER, District Judge:

Once again the case of *Eisen* v. *Carlisle & Jacquelin* has reached the point of determining whether it meets the requirements of a class action under Rule 23 of the Federal Rules of Civil Procedure. This is the latest in a series of opinions dealing with this complex issue, and it may not be the last. To recapitulate: *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966) initially determined that this case could not be maintained as a class action; *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) [hereinafter cited as *Eisen I*] held that the denial of the class action determination was appealable; *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) [hereinafter cited as *Eisen II*] reversed the initial denial of the class action and remanded to the district court for further findings necessary for the class action determination; *Eisen* v. *Carlisle & Jacquelin*, 50 F.R.D. 471 (S.D.N.Y. 1970) called for further information from the

parties as required by the Court of Appeals opinion in *Eisen II*. The nature of the case and of plaintiff's claims are adequately described in the prior opinions.

All parties have responded ably to the Court of Appeals and latest district court opinions, and it would appear that the court now has sufficient information to make all of the required findings for the class action determination.

First, the findings of fact relevant to the class action determination will be listed.[1] These findings were developed on remand and are based on submissions by the parties. Second, the conclusions required by Rule 23 will be made in light of these findings. Finally, the question of who shall pay for the cost of the Rule 23(c)(2) notice will be discussed.

FINDINGS OF FACT

1. During the period from May, 1962 through June, 1966, approximately 21,000,00 public individuals, institutions and intermediaries[2] (hereinafter collectively referred

1. The detailed findings of fact listed here should in no way be taken as an indication that this is a necessary procedure in every class action determination. See *Interpace Corp.* v. *City of Philadelphia*, 39 U.S.L.W. 2457 (3d Cir. Feb. 9, 1971). The approach has been dictated by the peculiar background and nature of this case.

2. The term "public individuals" means individuals who are neither members of the New York Stock Exchange nor partners nor stockholders in a member organization of the Exchange.

The term "institutions" includes savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, partnerships, governmental bodies, personal holding companies, and non-bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans having legal ownership of the shares bought and sold.

The term "intermediaries" means non-members of the New York Stock Exchange through whom orders for public individuals, institutions and other legal owners are placed with member firms. They include commercial banks, trust companies and non-member broker/dealers who place orders which are processed in an account or accounts in the name of the intermediary.

to as "shareholders") bought and/or sold shares of stock of the more than 6,700 corporations whose shares are publicly held.

2. Approximately 6,000,000 shareholders had odd-lot transactions (transfers involving less than 100 shares) during the period from May, 1962 through June, 1966 in stocks listed on the New York Stock Exchange (hereinafter "NYSE"). Approximately 6,600,000 shareholders had odd-lot transactions during the period from May, 1962 through June, 1968 in stocks listed on the NYSE. The number of shareholders having odd-lot transactions grew in the period June, 1966 through June, 1968 by approximately 5 percent a year, or a total of 600,000 persons.

3. During the period May, 1962 through June, 1966, the "average shareholder"[3] who had odd-lot transactions in stocks listed on the NYSE had approximately 5 such transactions. The average odd-lot transaction during such period was approximately 28.2 shares at $50.84 per share. The average odd-lot differential per transaction during such period was approximately $5.18.

4. During the period May, 1962 through June, 1968, the average shareholder who had odd-lot transactions in stocks listed on the NYSE (taking into account an increase in odd-lot volume which was greater than the increase in shareholders having odd-lot transactions), had approximately 7.4 such transactions. The average odd-lot transaction during such period was approximately 28.6 shares at $51.07 per share. The average odd-lot differential during such period was approximately $5.04.

5. Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June,

3. I.e., the typical buyer or seller of odd-lots.

1966 in stocks listed on the NYSE, the names and addresses of at least one-third, i.e. 2,000,000, can be identified as follows: fourteen of the largest brokerage firms[4] (hereinafter "wire firms") transmit their customers' odd-lot orders by teletype directly to either Carlisle & Jacquelin or DeCoppet & Doremus. (The remaining firms employ the telephone or some other means of communication.) These fourteen brokerage firms account for approximately 56 percent of the odd-lot transactions on the NYSE. The two odd-lot firms possess computer tapes on which are recorded the transactions of each wire firm customer who has had an odd-lot transaction since May, 1962. By comparing the records and tapes of the odd-lot firms with the wire firm tapes which contain the name and address of each customer, names and addresses of odd-lot customers can be generated.

6. Defendants Carlisle & Jacquelin and DeCoppet & Doremus, by the use of these computer tapes, can obtain the account numbers of a limited number of the largest of the odd-lot customers of the fourteen wire firms (who may or may not be the largest odd-lot customers) during any relevant period for which such tapes are available, as well as the number of odd-lot transactions executed for each such account number.

7. Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses of

4. These fourteen firms are: Merrill Lynch, Pierce, Fenner & Smith, Inc.; Bache & Co. Inc.; Francis I. duPont & Co. Inc.; Loeb, Rhodes & Co.; Dean Witter & Co. Inc.; Goodbody & Co.; Walston & Co., Inc.; Harris, Upham & Co. Inc.; Shearson, Hammill & Co. Inc.; Paine, Webber, Jackson & Curtis; Hayden, Stone, Inc.; Reynolds & Co.; E. F. Hutton & Company Inc.; and Dominick & Dominick, Inc.

the balance, approximately two-thirds, i.e., 4,000,000, cannot be identified with reasonable effort.

8. The shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE reside in every state in the United States as well as in most non-communist countries in the world. Approximately 6 percent reside in foreign countries. The geographical distribution of purchasers and sellers of odd-lots in stocks listed on the NYSE is, in proportion, the same as the geographical distribution of all owners of shares of stocks of public corporations as expressed in the table attached as Appendix A. From 1962 to 1965, New York and California had by far the largest numbers of such shareowners.

9. In addition to the shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE, approximately 100,000 or more public individuals had odd-lot transactions during the same period in stocks listed on the NYSE through the "Monthly Investment Plan."[5] Such individuals can be identified through computer tapes in a way similar to that discussed above for approximately 2,000,000 shareholders.

10. In addition to the shareholders who had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE and the Monthly Investment Plan customers described above, approximately 150,000 public individuals had odd-lot transactions during the same period in stocks listed on the NYSE through "payroll deduction

5. The "Monthly Investment Plan" allows public individuals, through member firms of the NYSE, to accumulate a stock or stocks of their choice on a pay-as-you-go basis by payment to the member firm of any amount from $40 to $1,000, either in monthly or quarterly installments. All Monthly Investment Plan transactions are in odd-lots.

plans",[6] all of which are operated by Merrill, Lynch, Pierce, Fenner & Smith, Inc. The names and addresses of such individuals can be identified through the records of Merrill, Lynch.

11. During the relevant period, the NYSE employed an advertising program in the United States under which it advertised in approximately 755 newspapers. The approximate cost of the space for a single one-eighth page insertion in these 755 newspapers was $65,000. The approximate cost of the space for a single one-eighth page insertion in every daily newspaper in the United States and Puerto Rico is $110,000. The NYSE also advertised in four or more magazines during each year from 1962 through 1968. The cost of space for magazine advertising during the first six months of 1968 was $400,000. The NYSE advertised in no other media.

12. There are at least 556 daily newspapers in the United States that carry full or partial quotations of stocks listed on the NYSE.

13. Member firms of the NYSE have offices located in approximately 842 cities or towns in the United States, and in 61 cities or towns in foreign countries. Additionally there are thousands of intermediaries who are located in virtually every country in the non-communist world.

6. A "payroll deduction plan" allows public individuals who are employees of corporations to accumulate stock of the corporation by which they are employed on a pay-as-you-go basis by regular deduction by the corporate employer from the salary or wages of the employee. Employees who are enrolled in payroll deduction plans share, pro-rata, all the brokerage commissions and other expenses incurred in the purchase of shares. Normally, a payroll deduction for such purchases requires odd-lot rather than round-lot transactions.

14. Rule 409 of the NYSE provides in part as follows:

> (a) Except with the permission of the Exchange, member organizations shall send to their customers statements of account showing security and money positions and entries at least quarterly to all accounts having an entry, money or security position during the preceding quarter. * * *
>
> (d) Customers' confirmations shall bear a notation or legend which will enable the customer to determine the amount of any odd-lot differential.

15. A representative sample from the available tapes of the fourteen wire firms (consisting of the tapes from four of the wire firms) indicates that for the period from mid-1962 through mid-1966, 1,967 account numbers had ten or more odd-lot transactions.

16. *Cherner* v. *Transitron Electronic Corporation*, 201 F. Supp. 934 (D. Mass. 1962) involved a class action brought under the Securities Act of 1933 on behalf of Transitron stockholders who purchased stock on or before February 20, 1962. The parties agreed, with the approval of the court, that defendants would create a $5,300,000 fund to settle all claims. The court appointed a Special Master, two Assistant Special Masters (including a computer corporation engaged to process claims), a distribution agent and an agent to arrange for publication of notice.

The Special Master mailed approximately 150,000 applications (forms for proof of claim) to brokers and to stockholders of record of Transitron for completion and return. Approximately 48,000 claims covering 50,000 transactions were received by the Special Master during the 60-day filing period; of this number, approximately 13,000 were

invalid, 1,177 were disapproved (143 of these after hearing) and 33,039 were approved.

The approximate expenses involved in administering the settlement fund were as follows: (a) counsel fees and expenses—$275,000; (b) Special Master—$54,000; (c) Assistant Special Master (attorney)—$79,000; (d) Assistant Special Master (computer corporation)—$688,000; (e) Distribution Agent—$12,000; (f) services related to publication (not including actual publication costs)—$9,000. The total expense was approximately $1,117,000.

The cost of distributing the settlement fund among the 33,036 claimants ultimately found entitled to participate averaged $25.47 per person excluding attorney's fees and $33.80 per person including attorney's fees.

17. The class action aspect of *State of West Virginia* v. *Chas. Pfizer & Co., et al.*, 68 Civ. 240 (S.D.N.Y.) (hereinafter cited as the "*Drug Cases*") involved a recovery on behalf of all consumers who purchased broad spectrum antibiotic products from 1954 to 1966. It is estimated that the class includes approximately 150 million persons located in every state of the Union and Puerto Rico. Defendants in the *Drug Cases* agreed to settle all cases for a total of $100,000,000; $37,000,000 of that was allocated to the class of individual consumers. Defendants also agreed to advance the expenses of maintaining and settling the class action, with the amounts so advanced to be deducted from the settlement fund if and when the settlement was ultimately approved.

18. The total expense of maintaining and settling the *Drug Cases* consumer class action will be approximately $285,000. These expenses can be divided into the following three categories:

(a) *Rule 23(c)(2) Notice*—A notice informing class members of their right to file claims or opt-out of the class

was published in every English and Spanish language newspaper of general circulation published in the United States. The total cost was approximately $130,000. In response to this notice 42 individual consumers served notices opting out. During the months immediately subsequent to publication of this notice, plaintiffs' attorneys received several hundred telephone calls from individual consumers and attorneys throughout the country seeking technical legal information with regard to the notice, including the nature of the claims asserted in the complaints, the right of a consumer to opt out, the liability of a consumer for costs and expenses if he did not opt out and other related expenses.

(b) *Rule 23(e) Notice*—A notice of hearing on the proposed settlement was published in the two newspapers of largest circulation in each state. The total cost of this publication was around $30,000. In addition, the Rule 23(e) notice was sent to each individual consumer who had filed a claim. Approximate expenses for this notice were: $6,300 for the preparation of the consumer class mailing list and $7,100 for duplicating and mailing the notice. In addition, about $8,500 of general expenses (cost of post office boxes and the expense of an escrow agreement) have been allocated to the consumer class. The total expense to the consumer class was, therefore, $53,000, in round numbers.

(c) *Processing of Claims*—As of August, 1970, plaintiffs' attorneys had received $65,000 for processing consumer claims; the best estimate for the total expense for this item is $100,000. Approximately 42,000 individual claims, representing total drug purchases of approximately $17,000,000, have been filed. All claims have been processed by plaintiffs' attorneys using their own filing system, refund forms and forms for responding to claimants. No special master has yet been appointed or found necessary. Approximately one-half of the 42,000 claims received did not

contain sufficient information to be accepted and required follow-up correspondence seeking clarification.

Approximately 80 percent of the claims filed contained only approximate cost information for various reasons, viz.: claimant had no records of drugs purchased; druggist refused to supply the information; drug store had ceased doing business; doctor could not or would not supply the information. To check validity of claims, plaintiffs' attorneys are reviewing each claim where total purchases exceed $1,000 and spot checking all others. Three categories have been established after review: claims approved in full, claims approved in part and disapproved claims. Plaintiffs' attorneys are recommending to the court that all approved claims be paid a fixed percentage of their total drug purchases.

19. Costs of publication of various size notices in newspapers of several large cities are set forth in Appendix B.

20. The printing cost for 2,000,000 copies of plaintiff's proposed notice would be approximately $9,350. The printing cost for 2,000,000 verified claim forms as proposed by defendants would be approximately $9,400.

21. The cost for stuffing a single page printed notice and mailing it with first class domestic postage would be 10 cents per letter, including the postage, irrespective of the number of letters to be sent.

RULE 23 CONCLUSIONS

I. *Prior Determinations*

The Court of Appeals heretofore has determined that certain requirements on the face of Rule 23 are satisfied in this action. To summarize, under Rule 23(a): (1) the

class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; and (3) the claims of plaintiff are typical of the claims of the class. *Eisen II* at 561-62. Rule 23(b)(1) and (2) are not applicable to this action. *Eisen II* at 564. Under Rule 23(b)(3), the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, *Eisen II* at 566, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Eisen I* at 121.

II. *Questions to be Considered on Remand*

A. *Adequacy of Representation*

The first question left open by the Court of Appeals for consideration by this court was whether the plaintiff, as representative party, will fairly and adequately protect the interests of the class. F.R.Civ.P. Rule 23(a)(4). For making this decision, the Court of Appeals set out certain guidelines. First, this court is to determine whether the attorney for plaintiff is "qualified, experienced and generally able to conduct the proposed litigation." *Eisen II* at 562. Second, the court must be satisfied that there is little likelihood of a collusive suit or of plaintiff's having interests antagonistic to those of the remainder of the class. *Id.* Third, and generally, the court must be satisfied that plaintiff is interested enough to be a forceful advocate and that a substantial number of class members would accept him as their representative if they were given a choice. *Id.* at 563 n.7; Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 Buff. L. Rev. 433, 460 (1960).

I have no hesitation in ruling that plaintiff and his attorney meet all of these requirements. It has already been determined that plaintiff's claim is typical of the claims of the class, and from the nature and quality of the litiga-

tion conducted to date, there is little doubt that plaintiff's attorney is a qualified, forceful advocate who will adequately protect the interests of the entire class. The issues raised thus far have all been hotly disputed, to say the least, and I find no evidence before me that this is a collusive suit. Defendants have suggested that since plaintiff has proposed a "fluid class recovery" as a means of distributing some if not all of the damages to the class, somehow this indicates that he has interests which are antagonistic to the remainder of the class. But, for reasons which are discussed more fully below in connection with the issue of manageability, I reject this argument and find that plaintiff's proposal is a flexible and practical means of satisfying the interests of the entire class.

B. *Manageability*

The second and by far the most difficult question to be considered by this court is what has generally been called the issue of manageability. It derives from one of the factors to be considered under Rule 23(b)(3) in determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pursuant to subparagraph (D), the court must examine "the difficulties likely to be encountered in the management of a class action". Although this is merely one factor among many on the face of the Rule, in a case of the size and nature of this one, the issue of manageability assumes major proportions.

Before discussing specific details of the management of this class action, a definitive ruling should be made as to the exact composition of the class. Based on the allegations in the complaint and on the findings set forth above, the class in this case is composed of all public individuals, institutions and intermediaries who bought and/or sold odd-lots of shares of stock on the NYSE during the period from

May 1, 1962 through June 30, 1966. Such definition is, of course, subject to modification at a later time. Rule 23(d), F.R.Civ.P.

1. *Computation of Damages.* One of the primary concerns of this court in its most recent opinion was whether, if liability were established, a specific amount of damages in fact could be determined without having each member of the class file an individual claim. In approaching this question, it is recognized that an exact computation is not required; it is sufficient, of course, if there is relevant data from which the jury can make a just and reasonable estimate of the damages. *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 264 (1946); see also *Union Carbide and Carbon Corporation* v. *Nisley,* 300 F.2d 561, 590 (10th Cir. 1962), appeal dismissed, 371 U.S. 801 (1962). If a wrong has been done, courts generally can find a way of placing a value, albeit a rough one, on the amount of damages suffered.

In this case, I am satisfied that gross damages may be fairly estimated without having individual claims filed by each class member. The sources for such a computation will include at least the following: defendants' own records, the REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 95, Part 2, 88th Cong., 1st Sess. (1963) [hereinafter cited as SEC Special Study], records of the NYSE Special Committee on Odd Lots relating to the lowering of the odd-lot differential in 1966 and a cost study of the odd-lot industry conducted for the NYSE by Price Waterhouse & Co. See *Daar* v. *Yellow Cab Company,* 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967); *contra, Hawaii* v. *Standard Oil Company of California,* Civ. No. 2826 (D. Hawaii, filed May 27, 1969).

Defendants consistently have stressed the number of variations in the types of odd-lot transactions, implying

that this would necessitate a separate calculation of damage for each individual transaction. Although originally influenced by this argument, see *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147, 150 (S.D.N.Y. 1966), in light of the availability of such information and records discussed above, I now reject it. As the Court of Appeals has pointed out, moreover, defendants make the same charge to all buyers and sellers no matter what the type of transaction. *Eisen II* at 562.

2. *Mechanics of Administration.* Under this heading the Court of Appeals directed that certain specific questions be considered to insure that insuperable obstacles do not present themselves at a later time after much time and money are expended by both the parties and the court. In the discussion of these questions, it will be noted that most of the estimates involved are based primarily on the experience of this court in administering the settlement of the consumer class action phase of the *Drug Cases*. Defendants have argued, and at least two courts have indicated, that the experience in the *Drug Cases* is not a valid reference for cases where there is no settlement and all issues are disputed to the bitter end. See *Hackett* v. *General Host Corporation*, Civ. No. 70-364 (E.D. Pa., filed July 30, 1970); Record of May 19, 1970, at 41-42, *Union Health Center of New York* v. *Chas. Pfizer & Co. Inc.*, Civ. No. 69-2838 (S.D.N.Y.). There is something to be said for this position; thus, where obvious distinctions between this case and the *Drug Cases* have required, I have adjusted estimated expenses accordingly. On the other hand, it is obvious that the major burden and cost of administering this class action will occur, if at all, at the point where liability has been determined and damages awarded. If this case should ever reach that posture, the remaining task would be distribution of a specific fund and in this sense not very

different from the settlement posture and procedures of the *Drug Cases.*

As to the specific areas of determination suggested by the Court of Appeals, first, I find that a special master hopefully and probably will not be necessary in this case. Although a special master and two assistants were appointed in the *Cherner* case at substantial cost, see Finding Number 16, I note that this procedure was successfully avoided in the *Drug Cases* where the burdens have been assumed by plaintiffs' counsel. Although it is true that plaintiff's counsel here is a single practitioner, he may receive assistance from counsel for other class members, and if not, arrangements for administrative assistance should not be too difficult or costly—and less costly, it is to be assumed, than the fees and expenses of a master.

Second, an estimate of the sums required for paperwork, printing, postage and publication is required. These sums can be divided into three categories: (a) Rule 23(c)(2) Notice, (b) Rule 23(d) Notice if liabiilty and damages are determined and (c) processing of claims and inquiries.

(a) As discussed more fully below, the cost of notice required by due process and Rule 23(c)(2) in this case can be computed at approximately $21,720.

(b) If liability and damage should be determined, more extensive notice to invite filing of claims under Rule 23(d) might be possible since the expense of such notice could be deducted from the total amount of damages. Thus, estimates for mailing individual notices to the 2,000,000 identifiable class members here, see Finding Number 5, would be $9,350 for printing notices, $9,400 for printing proof of claim forms and $200,000 for stuffing and mailing. In addition, relying on the *Drug Cases,* published notice might be required in

the two newspapers of largest circulation in each state at a cost of approximately $30,000. Publication in several major foreign newspapers can be estimated at $23,000. See Finding Number 19 and Appendix B.

(c) Processing of the 42,000 individual claims filed in the *Drug Cases* is expected to reach a total cost of approximately $100,000. See Finding Number 18. However, since this figure may not reflect the cost of processing of inquiries after the Rule 23(c)(2) notice and because there is great likelihood that there may be a larger number of claims filed in the instant case, an estimate for processing of claims and inquiries should be double the *Drug Cases* figure, or approximately $200,000.

Thus, combining all three categories, at this point in the litigation the best estimate of the total sums required for paperwork, printing, postage and publication is $500,000 in round numbers.

The third mechanical question generally concerns procedures for possible intervention of other class members. See *Eisen II* at 567. As the class action device has come to be used more frequently, the experience in this court has indicated that intervention can be accomplished by very simple procedures. For example, class members so inclined might contact plaintiff's counsel and make an appropriate motion setting forth concise facts indicating that the would-be intervenors qualify as class members.[7]

7. Also, the appellate court suggested, *Eisen II* at 567, that consideration be given to possible problems of jurisdiction and venue. Upon remand, counsel have not suggested nor do there appear to exist significant jurisdictional problems, save perhaps those related to the substance of plaintiff's claims discussed hereinafter. Since defendants are located within this district, as is the bulk of relevant documentary evidence, venue seems proper here. Finally, no significance in relation to the class action determination issue attaches to the fact that plaintiff has already demanded a jury trial.

The fourth mechanical question concerns possible problems class members might have in filing and proving their claims. Filing, of course, can be routinely accomplished by filling out and mailing in a proof of claim form to be supplied by the court through plaintiff's counsel. Defendants have already proposed a form which appears acceptable, with some possible minor modifications. Claims can be proved either by verification or certification by the claimant's broker-dealer. An analogous method has proved satisfactory in the *Drug Cases*. See also *Union Carbide and Carbon Corporation* v. *Nisley, supra* at 587-88. Defendants have submitted affidavits of brokers stating that, because of routine destruction of records or practical impossibility, they would be unable to furnish customers with records of their odd-lot transactions in the relevant period. Accepting these affidavits as true, they do not establish that all such records are unavailable through broker-dealers; moreover, it cannot be assumed from these available affidavits that customers are without records of their own. Lost or missing records are normal hazards of litigation in general; this circumstance cannot be fairly raised as a bar to class litigation.

3. *Distribution of Recovery.* The Court of Appeals has made clear that one of the most important considerations in a case of this type is the likelihood that class members will share in any eventual judgment. In weighing the class action question, the trial court must balance the desirability of providing a forum for bona fide small claims against the impropriety of permitting suits which only benefit lawyers. *Eisen II* at 567. Crucial also is the ability of the court to fashion a remedy, relying on its own and counsel's ingenuity, where a wrong has been done and where the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions and the retention of illegal profits. See *In re Multidistrict Private Civil Treble Damage Anti-*

trust Litigation Involving Motor Vehicle Air Pollution Control Equipment, 14 F.R. Serv.2d 420 (C.D. Cal. 1970); *Daar* v. *Yellow Cab Company, supra.* Cf. *Bigelow* v. *RKO Radio Pictures, supra* at 264.65.

Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. Such a view is appropriate where the disputed transactions themselves are personal and individual and have litigable significance to the plaintiff. The situation here, however, is different. Although the total volume of transactions is very large, each transaction, as far as the issues here are concerned, is thoroughly sterotyped and is sufficiently small so that the benefits of individual recovery are not worth the price of litigating individual claims. These transactions are also frequently repeated by many individuals who may be expected to repeat. See Finding Number 2.

With these indicia present, I think it appropriate, as plaintiff urges, to consider some kind of "fluid class recovery", i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not totally relevant to the conditions of this case, especially the small amounts of potential recoveries by most class members, which, absent the class device, would effectively bar suit by the majority of odd-lot investors. Perhaps fortuitously, the repetitive activity of the principals in odd-lot transactions makes it possible to fashion a procedure which will assure that the benefits of any recovery will flow in the main to those who bore the burden of defendants' allegedly illegal acts. Indeed, there is respectable precedent for such a "fluid class recovery". See *Bebchick* v. *Public Utilities Commission*, 318 F.2d 187 (D.C. Cir. 1963), cert. denied, 373 U.S. 913

(1963); the *Drug Cases, supra; Daar* v. *Yellow Cab Company, supra.* This does not mean, of course, that individual recovery is to be entirely ruled out. Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder.

It is not now necessary to determine the exact nature of fluid class recovery which might be used in this case. That is a matter for the court and the parties if and when liability is determined and damages assessed. It is necessary to recognize at this point, however, that a method of recovery of damages not claimed by individual class members can be fashioned to substantially benefit the entire class. In this regard, plaintiff has suggested that a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted. See *Bebchick* v. *Public Utilities Commission, supra; Daar* v. *Yellow Cab Company, supra.* In this manner, the class members, assuming they have maintained their odd-lot activity, will reap the benefits of any recovery. Without intending to rule now on the nature of any possible recovery in this case, suffice it to say that plaintiff's suggestion has sufficient merit to at least satisfy the court that some method of distribution will be possible if required.

Defendants have argued that plaintiff, by advancing this proposal, has effectively abandoned the original class and thereby established his inadequacies as champion of that class. I am constrained to disagree, however, since the proposal is specifically designed to provide the best practicable method of benefiting the original class—i.e. to insure that the litigation, if successful for the class, does not founder upon shoals of excessive costs and detail in awarding and computing damages on an individual basis. In

addition, defendants have suggested that plaintiff's proposal would constitute "judicial rate-fixing", thereby infringing upon the exclusive jurisdiction of the Securities and Exchange Commission ("SEC"). This argument may have merit, but defendants press it too far—i.e. such a reduction in the differential, if carried out, might properly be done under SEC supervision or at least with SEC approval.

Having thus considered possible methods for distribution of a recovery, there remains only for consideration the "mathematical prospects" of the case in order to ascertain at least the theoretical availability of a fund from which to distribute damages. This simply means and requires a rough estimation of potential damages, deducting therefrom the estimated costs of administration to determine a net potential fund available for actual distribution. The costs of administration were estimated heretofore at $500,000. Estimating gross potential damages is necessarily more difficult, but a rough maximum and minimum might be arrived at as follows: (1) maximum—defendants' reduction of the odd-lot differential in 1966 amounted to approximately $5,000,000 per year—multiplied by the four years here in question and trebled, damages might be $60,000,000; (2) minimum—assuming a five percent illegal portion of the odd-lot differential during the relevant period[8] and applying it to the average number of transactions and the average differential during the relevant period, multiplied by 6,000,000 and trebled, damages might be approximately $22,000,000. Thus, it becomes apparent that if plaintiff succeeds on behalf of the class, there will be a substantial recovery to be distributed.

8. Plaintiff has estimated that he paid $259 in odd-lot differentials from 1960-1966 and that his damages were about $70. Thus, his claim is that approximately 27 percent of the charge was illegal. For purposes of establishing a minimum on potential damages, I have arbitrarily chosen 5 percent.

C. *Notice*

Determination of the kind of notice and how to disseminate it, as this case illustrates, can be a difficult task for the district court. Notice must be governed not only by basic due process standards but also by the standards of Rule 23 (c)(2) itself. Thus, an examination of these requirements will be necessary before determining the kind of notice appropriate in this case.

As stated in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the fundamental requirement of due process in any final proceeding is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The test is a flexible one and must be applied on a case-by-case basis: "[I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Id.* at 314-15. Frequently a balancing of interests is required. *Id.* at 313-14. In addition, emphasis is to be placed upon the procedure adopted as a whole to insure that it results in full and fair consideration of all claims and adequately protects the interests of those persons not present but bound by the judgment. *Hansberry* v. *Lee*, 311 U.S. 32 (1940). See also *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra* at 319; *Dolgow* v. *Anderson*, 43 F.R.D. 472, 500 (E.D.N.Y. 1968); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kans. 1968); *State of Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), aff'd., 408 F.2d 1171 (1969).

Rule 23(c)(2) does not add to these requirements; it simply formulates guidelines for a particular kind of notice in a particular kind of action. See *Eisen II* at 568; Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98, 107 (1965) [hereinafter cited as Ad-

visory Committee's Note]. The district court must direct to the members of the class "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." F.R.Civ.P. Rule 23(c)(2). As is clear from the face of the Rule, the notice should be designed to inform class members of the possibility of their excluding themselves from the action, the possibility of their appearing and participating in the action and the fact that they will be bound by any judgment if they do not exclude themselves. In light of these purposes, it naturally follows that as the size of potential recovery available to each class member diminishes, any incentive class members may have to respond to the notice also diminishes. See *Berland* v. *Mack*, 48 F.R.D. 121, 129 (S.D.N.Y. 1969). Consequently, where a class consists of a large number of claimants with relatively small individual claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required.

Although not so stated in the Rule, the notice effectively serves to protect defendants in two ways. First, by including in the judgment all members who do not affirmatively opt out, defendants can obtain significant *res judicata* benefits. Second, a large number of class members may opt out, not wishing to press their claims even though they may be legitimate. In the context of this case, it is significant that the applicable statute of limitations has run, 15 U.S.C. §15b (1964); hence *res judicata* consequences presumably matter little to defendants. But see *Philadelphia Electric Company* v. *Anaconda American Brass Company*, 43 F.R.D. 452, 461 (E.D. Pa. 1968).

Finally, in determining what kind of notice is required by due process and Rule 23(c)(2), it must be recalled that expensive and stringent notice requirements could vitiate the class action device in situations where application there-

of as a matter of public policy can be important, such as private antitrust, consumer and environmental litigation. See *Herbst* v. *Able*, 47 F.R.D. 11, 21 (S.D.N.Y. 1969); *Dolgow* v. *Anderson, supra* at 497. Cf. *Booth* v. *General Dynamics Corporation*, 264 F. Supp. 465 (D. Ill. 1967). Hence, the district court must strive to fashion notice which fairly and adequately protects all interests in the action without imposing what in effect amounts to an insurperable tariff on prosecution of the case.

1. *Form of Notice.* Applying these general principles to the case at hand, the Court of Appeals has indicated that there should be some "evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c)(2)." *Eisen II* at 569. I believe that the findings of fact enumerated above should satisfy this requirement, and they are to be deemed incorporated in this discussion.

First, plaintiff has offered to send individual notice to all member firms of the NYSE and to all commercial banks with large trust departments, the assumption being that many class members may thus receive indirect but nevertheless effective notice. Although, by itself, this would be far from satisfactory, in combination with the other forms of notice discussed below, this proposal does increase the likelihood of reaching a significant portion of the class. The same is true for any news coverage which might be generated during the course of this suit. See *Snyder* v. *Board of Trustees of University of Illinois*, 286 F. Supp. 927 (N.D. Ill. 1968); *Johnson* v. *Robinson*, 296 F. Supp. 1165 (N.D. Ill. 1967), aff'd, 394 U.S. 847 (1969).

Second, some form of mailed notice must be sent to individual class members who are reasonably identifiable. Defendants have taken the position that any mailed notice must go to all of the approximately 2,000,000 class members

who are identifiable. See Finding Number 5. Although the argument has some merit, I conclude that such notice is not compelled by the standards of due process and Rule 23(c)(2) in the context of this case. First, the flexibility of the rule is clear on its face, speaking in terms of the "best notice practicable under the circumstances" and of class members who are indentifiable "through reasonable effort."[9] In addition, even due process requirements have been phrased in terms of identifying persons whose names and addresses are "very easily ascertainable." *Schroeder* v. *City of New York*, 371 U.S. 208, 212-13 (1962).

Individual notice in this case shall be mailed to the approximately 2,000 or more class members who had ten or more transactions during the relevant period. See Finding Number 15.[10] This accords with the Court of Appeals' suggestion of trying to identify those class members who may have "enough of a stake in the proceedings to justify personal intervention." *Eisen II* at 569. In order to insure adequate representation and to gain more information about the nature of the class, individual notice shall also be mailed to 5,000 other class members selected at random

9. See also Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 396 (1967):

> In particular cases it may be practicable to give notice under (c)(2) which will reach each member of the class. That will not be possible in all cases, but when large numbers of people are dealt with, perfect notice, while on the one hand hard to attain, becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if such differences exist) will in fact be reached and will speak up.

10. The figure in Finding Number 15 is based on a representative sample of the tapes of four of the fourteen wire firms which have such tapes. I assume that a survey of the remaining tapes will turn up more than the approximately 2,000 identified so far.

from the 2,000,000 persons and firms who are identifiable.[11] The total cost would be approximately $1,000 for printing, stuffing and mailing.

Third, and finally, notice by publication shall be required as a feasible attempt to reach the remainder of the class. Such notice shall be one-quarter page in size and shall take place once each month for two consecutive months in the following publications: (1) national edition of the *Wall Street Journal* (approximately $5,000); (2) financial section of the *New York Times* (approximately $2,100); (3) financial sections of the *San Francisco Chronicle* and *San Francisco Examiner* (approximately $1,700); and (4) financial section of the *Los Angeles Times* (approximately $1,560). Obviously, these are somewhat arbitrary determinations intended to provide the most suitable notice under the circumstances, but there are significant reasons for choosing these publications. The *Wall Street Journal* has long served the overall community of investors, and the national edition should reach a large and disparate number of class members. Also, as of 1965, New York and California had by far the largest number of shareowners of public corporations in comparison to all other states; there is no reason to suppose their position has slipped in the intervening six years. See Finding Number 8 and Appendix A. Selection of the particular cities and newspapers is designed to reach the largest number of class members in those areas.

In the circumstances of this case, I reason that such notice devices together will fairly accommodate the interests of both the class and the defendants. Assuming that a significant number of class members should exclude themselves, this might be viewed as an indication that the inter-

11. There is an additional reason for requiring this random notice—it is theoretically possible that the large claimants might form a special subclass either friendly toward defendants or not entirely representative of the small claimants.

ests of the class are not being adequately represented. In such event, to properly consider the question of whether defendants should be shielded from the expense and effort of defending a suit which a large number of class members may not favor, further individual notice might then be required. On the other hand, a lack of response to the notice would not shed any light on adequacy of representation and would probably mean that the notice was sufficient for this case. See *Eisen II* at 563.

2. *Contents of Notice.* Although it is not necessary to decide now the final content of the notice, plaintiff has made a proposal, attached as Appendix C, which is succinct and, with minor modifications, should be satisfactory. That proposal specifically includes a brief description of the proposed fluid class recovery, thus giving each class member an opportunity to express himself on this aspect of the suit. In order to gain more information about the nature of the class, the mailed notice to individual class members will also include a request for the following information: the number of odd-lot transactions during the 1962-1966 period, specifying for each the number and price of shares bought or sold, the name of the stock, the name of the brokerage firm and the amount of the odd-lot differential charge if known. Such a request will be for voluntary responses only and will not be treated as a requirement for inclusion as a member of the class. But see *State of Iowa* v. *Union Asphalt & Roadoils, Inc., supra* at 403-05; *Philadelphia Electric Company* v. *Anaconda American Brass Company, supra* at 462. Not only would such a mandatory procedure be contrary to the language of Rule 23(c)(2), but also it would be unnecessary in this case in light of the contemplated method of computing damages and the proposed fluid class recovery heretofore discussed.

3. *Administration of Notice.* Plaintiff shall be responsible for making all arrangements for printing, mailing and

publication, except that defendants shall supply him with all necessary names and addresses of individual class members. The individual notice will be sent on court stationery from the Clerk of the Court with a special post office box designated for all responses. Inquiries and responses will be managed by the plaintiff under court supervision.

III. Cost of Notice

The question of who shall pay for the Rule 23(c)(2) notice is the only serious obstacle remaining which might prevent the maintenance of this suit as a class action.[12] Plaintiff has asserted from the outset that he cannot pay for the forms and methods of notice ruled necessary in this case, and if I were to follow literally the earlier indication of the Court of Appeals that the plaintiff must always pay for the expense of notice in the first instance, *Eisen II* at 568, this litigation would come to an abrupt termination.

Thus, the doubts and difficulties of this class action become finally focused on this one issue. If the expense of notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a restrictive interpretation, *Eisen II* at 563. On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim. In addition to the probability of encouraging frivolous class actions, such a step might also result in defendants' passing on to their customers, including many of the class members in this case, the expenses of defending these actions.

12. The cost of any subsequent notice, for example under Rule 23(d) regarding the filing of claims, should not present the same problem since the issue of liability will have already been determined.

A. Considerations in Allocating Expenses of Notice

After reviewing all of the submissions and arguments of the parties to date, I conclude that I cannot now fairly decide the question of who shall bear the expense of the Rule 23(c)(2) notice. There are various considerations which lead to the conclusion that, in the context of this case, it may be appropriate to impose a share or a substantial portion of the notice expense on the defendants.

First, the issue of who shall bear these expenses has not been decided as one rule to be applied to all cases. Although some courts and commentators have assumed that plaintiff shall always pay the cost in the first instance,[13] some have also declined to make such an assumption and recognized the propriety of apportioning the burdens in certain cases.[14] Indeed, despite the apparently unequivocal language in *Eisen II, supra,* the Court of Appeals for this circuit has indicated in a subsequent opinion that the question is still an open one. *Green* v. *Wolf Corp.,* 406 F.2d 291, 301 n.15 (2d Cir. 1968). I think that the better view is that

13. See *Weiss* v. *Tenney Corp.,* 47 F.R.D. 283, 294 (S.D.N.Y. 1969); *Richland* v. *Cheatham,* 272 F. Supp. 148, 156 (S.D.N.Y. 1967); Ward and Elliot, *The Contents and Mechanics of Rule 23 Notice,* 10 B.C. Ind. & Com. L. Rev. 557, 566-67 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, supra* at 398 n.157; Frankel, *Amended Rule 23 from a Judge's Point of View* in Symposium, "Amended Federal Rule 23: Antitrust Class Actions?" 32 A.B.A. Antitrust L.J. 251, 300 (1966). *Compare* Wright, Remarks to Judicial Conference of the Third Circuit, 42 F.R.D. 437, 565 (1966) *with* Wright, Class Actions, 47 F.R.D. 169, 180 (1969).

14. See *Bragalini* v. *Biblowitz,* CCH FED. SEC. LAW REP. ¶92,537 (S.D.N.Y. Dec. 16, 1969); *Herbst* v. *Able, supra; State of Minnesota* v. *United States Steel Corporation,* 44 F.R.D. 559, 577 (D. Minn. 1968); *Dolgow* v. *Anderson, supra* at 498-500; Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 Md. L. Rev. 139, 156 (1969); Note, *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 Harv. L. Rev. 874, 938 (1958).

the decision on this question, whenever required because of plaintiff's inability to pay, is an appropriate area for the exercise of the court's discretion, "having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants." *Berland* v. *Mack, supra* at 131. To the extent that this may result in the imposition of a burden on defendants prior to trial, analogy to the preliminary injunction remedy lends some support. A prime policy consideration underlying preliminary injunctive relief may be applicable here, viz., the need to create or preserve a state of affairs which will enable the court to render a meaningful decision. See Note, *Developments in the Law—Injunctions,* 78 Harv. L. Rev. 994, 1056 (1965).

Second, this court cannot overlook the serious nature of the antitrust claims in this suit when viewed against the strong public policy behind the antitrust laws in general, and the fundamental role of the private treble-damage action in enforcing those laws in particular. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 131 (1969); *United States* v. *Borden Company,* 347 U.S. 514, 518 (1954); *Monarch Life Insurance Company* v. *Loyal Protective Life Insurance Company,* 326 F.2d 841, 845 (2d Cir. 1963), cert. denied 376 U.S. 952 (1964). In a case such as this, even if the Securities and Exchange Commission were to bring its own action, it would be limited to seeking an injunction only, practically less than an adequate remedy since many of the alleged practices of defendants have been subsequently modified. The private class action is the only means of providing for repayment of any alleged illegal profits. See *Dolgow* v. *Anderson, supra* at 482-83.

Third, because the statute of limitations has now run in regard to the claims in this case, no one else will be able to

pursue the offenses alleged here, not even the government. See *Green* v. *Wolf Corp., supra* at 301 n.14. But see *Philadelphia Electric Company* v. *Anaconda American Brass Company, supra* at 461. In sum, plaintiff's action provides the only available means of reaching the merits of this controversy.

Fourth, after reviewing the purposes and structure of Rule 23, the Court of Appeals has specifically held that it is to be given a liberal rather than a restrictive interpretation. *Eisen II* at 563.

Fifth, the public interest in this case is at least theoretically great, not only because of the serious nature of the antitrust claims, but also because of the large number of persons affected by the allegedly illegal overcharge. The New York Stock Exchange and its member brokers owe very important duties to investors, see generally 15 U.S.C. §§78a *et seq.* (1964), and this suit directly raises questions concerning public confidence in the stock market and its fiduciary institutions. Cf. *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 349-50, 359 (1963).

Sixth, a class action will provide important *res judicata* effects for defendants, although it is true that this consideration is of little importance here because the statute of limitations has run.

Seventh, and finally, although the court has by no means reached the substance of this case as yet, there are bases for presuming merit in plaintiff's claims. In view of the SEC Special Study, *supra,* and the NYSE cost study and subesequent reduction of the odd-lot differential by approximately $5,000,000 per year, this cannot presently be characterized as a frivolous suit. From this it follows that it would be unfair to tax plaintiff with the cost of paying for notice at this point.

B. Preliminary Hearing on Merits

Before considering how to apportion the costs of notice, if plaintiff cannot pay, the court itself must have a preliminary but reasonably thorough view of the merits of the case. See *Berland* v. *Mack, supra* at 132. Cf. *City of New York* v. *International Pipe and Ceramics Corporation*, 410 F.2d 295, 297 (2d Cir. 1969); *Green* v. *Wolf Corp., supra* at 294. Again, an analogy to the preliminary injunction is helpful: before imposing a burden on defendants prior to trial, plaintiff must make a strong showing of likelihood of success at trial on the merits. See *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953). Such a procedure is allowed even though the court cannot be assured of plaintiff's final success, particularly where the ultimate issues are to be decided by a jury. *Id.* But see *Berland* v. *Mack, supra* at 132.

In this case, the most efficient way for the court to become sufficiently aware of the merits of plaintiff's claims to make a reasoned decision on the cost of notice is to hold a preliminary hearing on the merits similar to that originally suggested in *Dolgow* v. *Anderson, supra* at 501. Although such a hearing has been considered and rejected by several courts, the facts and circumstances of those cases were markedly different from those at hand, thereby rendering those decisions distinguishable.[15]

Holding a preliminary hearing at this stage will allow the parties to conduct significant discovery, limited by the date set for the hearing. See *Dolgow* v. *Anderson, supra* at 502. There may be some duplication of discovery if notice should eventually go out and other counsel for plaintiffs intervene, but the court undoubtedly will be able to control any such problems.

15. See *City of Philadelphia* v. *Emhart Corp.*, 14 F.R. Serv.2d 332, 334 (E.D. Pa. 1970); *Fogel* v. *Wolfgang*, 47 F.R.D. 213, 215 n.4 (S.D.N.Y. 1969); *Berland* v. *Mack, supra* at 132; *Mersay* v. *First Republic Corporation of America*, 43 F.R.D. 465, 469 (S.D.N.Y. 1968). But see *Green* v. *Wolf Corp., supra* at 301 n.15; *Cannon* v. *Texas Gulf Sulphur Co.*, 47 F.R.D. 60 (S.D.N.Y. 1969).

The preliminary hearing will also serve to place the risk of success equally upon the class and defendants without requiring a crucial determination prematurely. Although it is true that counsel for other class members who later choose to intervene will not be able to participate in this preliminary hearing, this is a necessary concomitant of the procedures required by Rule 23. Moreover, the court has already determined that plaintiff's counsel adequately represents the class.

I have also determined that a preliminary hearing is superior to other possible procedures. One such alternative would be to allow the action to proceed to a determination on the merits before assessing the costs of notice and send notice only if plaintiff is successful. Compare *Union Carbide and Carbon Corporation* v. *Nisley, supra* with *Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). This suggestion must be rejected for several reasons: (1) it is at least theoretically contrary to the language of Rule 23 calling for an early determination of the class action question; (2) in effect it amounts to "one-way intervention," a procedure the rule was designed to avoid, Advisory Committee's Note, *supra* at 105-06; (3) counsel for other class members may desire to participate at an early stage. Another alternative might be to simply allow the action to proceed with discovery and pre-trial motions, postponing a decision on the cost of notice until some unspecified later date. See *City of Philadelphia* v. *Emhart Corp., supra* at 335-36. This, however, may well lead to a point at which the court and the parties become "hopelessly entangled in a mass of procedural detail and expense." *Eisen II* at 570.

Finally, after the hearing and after all papers have been submitted, a motion for summary judgment by either side may be appropriate, cf. F.R.Civ.P. Rule 12(b)(6), but I am quick to point out my reluctance to treat the proceedings as a forerunner to such a motion and my inclination to limit

any determination solely to the question of who shall bear the expense of the Rule 23(c)(2) notice. See *Dolgow* v. *Anderson*, —— F.2d ——, Docket No. 33719 (2d Cir., filed Sept. 2, 1970). Summary judgment is such a drastic remedy that only in the most compelling circumstances should it be considered without opportunity for participation by other class members.

C. *Nature of Preliminary Hearing*

The preliminary hearing will be commenced no later than 60 days from the date of the filing of this opinion. This should allow sufficient time for minimum necessary discovery and at the same time prevent the proceedings from continuing longer than absolutely necessary. The hearing itself should be brief, and the parties are encouraged to submit whatever evidence they deem relevant in the form of stipulations, affidavits or depositions to the extent that they are practicable. Actual testimony should be required only from very important witnesses.

As to the merits of the controversy, the parties are directed to address the following issues: (1) did the brokerage defendants monopolize the odd-lot market on the NYSE from 1962 to 1966; (2) did the brokerage defendants control the competition and the odd-lot differential charge in such market; (3) if such conduct by the brokerage defendants can be shown, did the NYSE breach its duties to investors under the Securities Exchange Act of 1934 by failing to exercise proper control; (4) what were the effects of the alleged anticompetitive conduct; (5) to what extent did the Securities and Exchange Commission exercise actual supervision and review over the conduct of defendants in the odd-lot field during the relevant period; (6) to what extent did the regulatory scheme set up under the Securities Exchange Act of 1934 perform an antitrust function; (7) was the conduct of defendants necessary to make the Securities Exchange Act of 1934 work? See, generally,

Silver v. *New York Stock Exchange, supra; United States* v. *E. I. duPont de Nemours Co.*, 351 U.S. 377 (1956); *Thill Securities Corporation* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970); 15 U.S.C. §§78a *et seq.* (1964). Amicus brief will be invited from the SEC and the Antitrust Division of the Justice Department. See *Thill Securities Corporation* v. *New York Stock Exchange, supra* at 273.

After the hearing the following alternative courses of action are open to the court, all subject to reallocation after trial: (1) plaintiff might be required to pay the entire cost of notice; (2) plaintiff and defendants might share the cost in a proportion to be decided; (3) defendants might be required to pay for a major portion of the cost with plaintiff paying a substantial amount and posting a bond for the balance allocated to defendants, cf. F.R.Civ.P. Rule 65(c); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333 (1959).

In summary, for the reasons discussed above I have determined that this suit is a proper class action under F.R.Civ.P. Rule 23 and, except for assessment of the cost of notice yet to be decided, it shall go forward as such. The parties are directed to expedite discovery and preparation for the preliminary hearing as outlined in this opinion.

Finally, it should be recalled that the Court of Appeals in *Eisen II* (at 570) expressly retained jurisdiction of the class action determination issue. Admitting to some uncertainty on the point, I believe that in the interests of orderly procedure and a complete record, any appeal should await the outcome of the preliminary hearing directed in this opinion.

It is so ordered.

Dated: New York, N. Y.
April 7, 1971.

H. R. Tyler, Jr.
U.S.D.J.

Appendix A to Opinion of Tyler, J.

Geographic Distribution of Shareowners of Public Corporations

State	*Number of Shareowners (thousands)*			
	1956	1959	1962	1965
Alabama	30	87	114	172
Alaska	—	3	5	9
Arizona	33	62	95	179
Arkansas	17	50	58	94
California	1,011	1,480	2,037	2,540
Colorado	75	112	157	240
Connecticut	219	300	459	505
Delaware	37	50	75	79
Dist. of Columbia	57	112	126	121
Florida	172	312	522	704
Georgia	65	137	170	243
Hawaii	—	13	18	39
Idaho	10	26	33	43
Illinois	732	874	1,157	1,308
Indiana	117	237	374	382
Iowa	78	125	187	202
Kansas	54	112	157	221
Kentucky	53	100	124	161
Louisiana	64	100	151	149
Maine	56	75	94	123
Maryland	144	237	367	424
Massachusetts	531	512	681	805
Michigan	370	625	794	946
Minnesota	110	175	255	260
Mississippi	15	38	61	92
Missouri	178	325	408	501
Montana	29	37	59	61

Appendix A

State	Number of Shareowners (thousands)			
	1956	1959	1962	1965
Nebraska	36	50	90	99
Nevada	11	13	23	42
New Hampshire	59	50	75	101
New Jersey	554	625	902	1,086
New Mexico	10	37	46	60
New York	1,699	1,903	2,341	2,407
North Carolina	50	125	238	322
North Dakota	11	12	36	30
Ohio	317	587	791	865
Oklahoma	51	100	134	181
Oregon	54	100	152	200
Pennsylvania	671	1,024	1,378	1,408
Rhode Island	84	75	99	122
South Carolina	19	63	71	117
South Dakota	18	25	38	40
Tennessee	57	100	134	201
Texas	160	375	517	744
Utah	23	37	50	78
Vermont	29	37	55	72
Virginia	120	250	302	422
Washington	77	149	202	262
West Virginia	58	100	102	100
Wisconsin	167	212	323	360
Wyoming	12	26	30	41
U. S. Terr. & Poss.	8	3	5	14
Foreign Countries—U. S. Citizens Living Abroad	18	96	138	143

Appendix B to Opinion of Tyler, J.

	Full Page	*½ Page*	*¼ Page*	*Circ.*
Wall St. Journal				
National	$19,855.68	$9,927.84	$4,963.92	1,262,000
Eastern	7,672.32	3,836.14	1,918.08	520,000
Midwest Edition	6,287.04	3,143.52	1,571.76	390,000
Pacific Coast	3,907.20	1,953.60	976.80	231,000
Southwest	2,344.32	1,172.16	586.08	120,000
New York				
News—Full Run (Daily)	5,530.00	2,765.00	1,382.50	2,130,000
News—City & Sub.	4,940.00	2,470.00	1,235.00	1,805,000
Post	3,492.00	1,746.00	873.00	698,845
Times	8,400.00	4,200.00	2,100.00	977,297
Chicago				
News	3,918.40	1,959.20	1,066.40	453,000
News (Sun. Times—City & Sub.)	2,899.00	1,574.80	787.40	402,000
News (Sun. Times—Full Run)	3,188.90	1,732.28	866.14	453,000
Sun-Times	1,875.00	1,026.00	427.50	530,000
Sun-Times (News—City-Sub.)	1,650.00	906.00	453.00	506,000
Sun-Times—News—Full Run	1,815.00	1,122.00	561.00	530,000
Today—Full Run	1,537.00	864.00	432.00	435,000
Today—(City-Sub.)	1,175.00	720.00	360.00	422,000
Today (Tribune) Full Run (C.&S.)	1,175.00	720.00	360.00	422,000
Tribune Full Run	5,498.00	2,876.80	1,531.00	768,000
Tribune (City & Sub.)	4,615.00	2,467.60	1,351.60	623,000
Tribune (Today) Full Run	4,876.00	2,592.00	1,296.00	768,000
Tribune (Today) (City & Sub.)	4,154.00	2,219.00	1,215.00	623,000
Los Angeles				
Herald Examiner	4,009.60	2,004.80	1,052.80	503,000
Times	5,424.00	3,120.00	1,560.00	982,000
San Francisco				
Chronicle	5,658.80	2,829.40	1,414.70	480,000
Examiner	3,347.12	1,673.56	836.78	204,000
Chronicle/Examiner	6,742.40	3,371.20	1,685.60	684,000
London				
Daily Express (D.M.)	12,600.00	6,300.00	3,150.00	3,947,500
Daily Mail (D.M.)	7,800.00	3,900.00	1,950.00	1,992,500
Daily Mirror (D.M.)	9,674.00	4,837.00	2,419.00	4,924,000
Daily Sketch (D.M.)	1,910.00	955.00	475.00	900,000
Daily Tele. & Sun. Tel. (D.M.)	9,300.00	4,650.00	1,325.00	1,400,000
Evening News (D.E.)	7,865.00	3,933.00	1,966.00	1,088,500
Evening Standard (D.E.)	2,886.00	1,440.00	720.00	595,000
Financial Times (Wkly. Bus.)	5,069.00	2,535.00	1,267.00	172,347
Greyhound Express (D.M.)	436.00	218.00	109.00	68,000

Appendix B

	Full Page	*½ Page*	*¼ Page*	*Circ.*
don (cont'd)				
he Guardian (D.M.)	3,600.00	1,800.00	900.00	293,000
v. Chr. & Stock Ex. Gaz. (W.B.)	600.00	300.00	125.00	50,000
orning Star (D.M.)	720.00	360.00	180.00	62,000
ews of the World (Wkly)	20,259.00	10,129.00	5,065.00	6,228,000
bserver (Weekly)	8,025.00	4,013.00	2,006.00	879,000
he People (Weekly)	17,280.00	8,640.00	4,320.00	5,455,500
nday Express (Weekly)	16,200.00	8,100.00	4,050.00	4,206,500
he Sunday Times (Weekly)	12,672.00	6,336.00	3,168.00	1,500,000
he Times (D.M.)	5,750.00	2,875.00	1,438.00	437,500
n (D.M.)	1,815.00	908.00	454.00	951,000
nday Mirror (Wkly)	9,758.00	4,879.00	2,440.00	5,009,000
s				
'Aurore (D.M.)	3,825.00	1,913.00	956.00	329,000
'Equipe (D.M.)	2,253.00	1,127.00	563.00	365,000
e Figaro (D.M.)	4,052.00	2,021.00	1,013.00	424,500
rance—Dimanche (Wkly)	7,659.00	3,830.00	1,915.00	1,270,500
rance—Soir (D.E.)	9,400.00	4,700.00	2,350.00	1,049,000
e Herisson—La Presse (Wkly)	2,273.00	1,137.00	568.00	400,000
i Paris (Wkly)	6,052.00	3,026.00	1,513.00	981,000
e Journal du Dimanche (W.B.)	4,550.00	2,275.00	1,137.00	550,000
inute (Weekly)	1,470.00	735.00	368.00	151,500
e Monde (D.E.)	3,310.00	1,655.00	828.00	355,000
aris-Jour (D.M.)	1,430.00	715.00	358.00	257,500
aris-Presse-l'Intransigeant (D.M.)	2,478.00	1,239.00	620.00	50,000
e Parisien Libere (D.M.)	8,583.00	4,292.00	2,146.00	778,000
a Vie Francaise (W.B.)	3,550.00	1,775.00	838.00	102,500
e				
vanti	2,048.00	1,024.00	512.00	130,000
orrieredello Sport (D.M.)	2,306.00	1,153.00	577.00	191,500
ily American (D.M.)	1,891.00	946.00	473.00	36,000
iornale d'Italia (D.E.)	2,884.00	1,442.00	721.00	90,000
Globo (D.E.)	2,388.00	1,194.00	597.00	35,000
Messaggero (D.M.)	4,450.00	2,225.00	1,113.00	301,000
omento Sera (D.E.)	2,336.00	1,168.00	584.00	80,000
'Osservatore Romano (D.M.)	2,453.00	1,227.00	614.00	70,000
ese Sera (D.)	3,116.00	1,558.00	779.00	180,500
Popolo (D.M.)	2,160.00	1,080.00	540.00	106,000
Tempo (D.M.)	3,895.00	1,947.00	974.00	220,000
Fiorine (D.M.B.)	2,670.00	1,335.00	667.00	49,000

M. = Daily Morning
E. = Daily Evening
= Daily
B. = Weekly Business
S. = City & Suburban

Appendix C to Opinion of Tyler, J.

Plaintiff has brought an action in the United States District Court for the Southern District of New York on his own behalf and on behalf of all other persons who had an odd-lot transaction on the New York Stock Exchange in the period 1962-1966 (the "class"). The defendants are Carlisle & Jacquelin, DeCoppet & Doremus (referred to collectively for convenience as the "brokerage firm defendants") and the New York Stock Exchange. The essence of the action is the allegations that the brokerage firm defendants have monopolized the odd-lot business of the New York Stock Exchange and have conspired to fix an excessive odd-lot differential (the odd-lot differential being the extra amount charged when a transaction on the stock exchange involves fewer than 100 shares) in violation of the anti-trust laws of the United States. It is further alleged that the New York Stock Exchange knew of these wrongs but permitted them to occur. Defendants have denied all the material allegations of the complaint and have denied any wrongdoing whatsoever. The issues of whether any of the defendants are liable and the extent of such liability are complicated and have not yet been determined by the Court.

Since it would be impracticable to return to each member of the class his precise damages the Court has ruled that any recovery, to the extent not asserted by members of the class, will be offset against the odd-lot differential charged in the future.

If you are a member of the class you may be excluded from the class if you so request in writing by [a given date]. A judgment in this case, whether favorable or not, will include all class members who do not request exclusion. Any member who does not request exclusion may, if he desires, enter an appearance through his counsel. You should be advised, however, that if you do choose to be excluded

from the class you may be prevented from bringing your own action because of the running of the statute of limitations.

If you choose to be excluded from the class or if you desire to be represented by your own counsel, please notify the Court by writing to: The Clerk of the Court, United States District Court, Southern District of New York, Box ————, ———————— Post Office, New York, New York.

Opinion of Tyler, J., Dated April 4, 1972 Providing that Defendant Shall Bear 90% of Costs of Notice to Class

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TYLER, District Judge:

This case is currently on remand from the Court of Appeals for class action determination. In deciding whether this case could be maintained as a class action, this court was directed to consider "* * * questions of notice, adequate representation, effective administration of the action, and any other matters which the District Court may consider pertinent and proper." *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 570 (2d Cir., 1968). After able response by the parties to these and other issues, it was decided that this case could and should be maintained as a class action. *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y., 1971); at the same time, however, decision on the issue of the allocation of the costs of notice of that status to the class was reserved. Specifically, in recognition of the fact that cost of notice as required might impose unfair burdens upon either plaintiff or defendants, it was decided to hold a preliminary hearing on the merits to determine whether, and, if so, how such costs might be allocated among the parties. In this preliminary hearing, the parties were afforded the opportunity to present evidence showing "* * * 'the likelihood that one party or the other would prevail at trial' * * *" *Dolgow* v. *Anderson*, 43 F.R.D. 472, 502 (E.D.N.Y., 1968). If, after the hearing, the evidence showed that the "* * * chances of ultimate success of plaintiff and the class were sustained", *Dolgow* v. *Anderson*, 438 F.2d 825, 827 (2d Cir., 1971), defendants

would be required to pay all or part of the costs of notice. *Eisen* v. *Carlisle & Jacquelin, supra,* 52 F.R.D. at 272.

The "mini-hearing", as this preliminary hearing has come to be termed, was held on February 9, 1972. No oral testimony was taken, the parties preferring instead to rely on submission of voluminous documentary evidence. Argument by counsel was heard, and briefs were submitted thereafter. There follow findings of fact and conclusions of law concerning plaintiff's anti-trust and "failure to regulate" claims which are based on evidence currently before this court. They may be considered binding on the parties and court only for the stated purpose of the hearing; the allocation of the cost of notice. Thus, they may not be considered to prejudice any party's right to introduce more evidence and proffer further argument when the merits are reached for final determination.[1]

Briefly stated, plaintiff asserts that he and the class were injured by various anti-competitive practices of defendants. Specifically, plaintiff complains that in establishing differentials to be added to the price of odd-lot stock traded over the New York and other exchanges, defendants were guilty of *per se* violations of the antitrust laws. Plaintiff further complains that the class was injured by the New York Stock Exchange's alleged failure to regulate odd-lot transactions as it is required to do by the terms of the Securities Exchange Act of 1934 ("the Act").

On the basis of the evidence presently before the court, I conclude that plaintiff class is more than likely to prevail on both of these claims and that defendants must therefore bear the major share (90%) of the cost of notice to the class.

1. Plaintiff's counsel have argued that the merits of this case can be reached on motions for summary judgment—and that the present record before the court is complete for such resolution. Even if this be true, this court declines, as stated in the text, to treat this case on the merits at this juncture.

FINDINGS OF FACT

1. The defendant odd-lot firms, Carlisle & Jacquelin and DeCoppet & Doremus (the "odd-lot defendants"), during the years 1960 to 1966 enjoyed a monopoly of odd-lot transactions over the New York Stock Exchange ("the Exchange").

2. Prior to the enactment of the Act, the differentials charged by odd-lot firms operating over the Exchange were set by agreements among the firms themselves with the approval of the Board of Governors of the Exchange. This procedure was not essentially changed after the enactment of the Act until 1966 when the Exchange adopted a rule establishing odd-lot differentials.

3. The Exchange in 1934 filed a registration statement with the Securities and Exchange Commission. In that document and in annual amendments filed with respect thereto, the Exchange described its regulation of odd-lot firms as follows:

> "Transactions in odd-lots are effected on this Exchange under methods which have been prescribed by the odd-lot brokers and dealers with the *acquiescence* of the Exchange." (emphasis supplied)

4. Prior to 1964, the Exchange had adopted five rules pertaining to odd-lot transactions. None of these rules in any way pertained to or sought to regulate the differentials to be charged in odd-lot transactions. These five rules, which can only be said to apply to peripheral matters, constituted the only formal regulation of odd-lot brokers and dealers by the Exchange.

5. Prior to its adoption of Exchange Rule #125 in 1964, the Exchange was the only national exchange not to have established rules regulating odd-lot differentials.

6. In 1938, in addition to the two odd-lot defendants, four smaller specialist firms were also transacting odd-lot business on the Exchange. These smaller firms, which at that time accounted for 2½% of all odd-lot business on the Exchange, had adopted the practice of absorbing transfer taxes in their odd-lot sales. The odd-lot defendants, who chose not to absorb these costs, complained of these competitive practices to the Exchange's Committee on Floor Practice. After confidential hearings, the Committee decided:

> "* * * that the differentials at which odd-lot dealers do business should be the same. The Committee believes that price competition between odd-lot dealers is detrimental to the best interests of the Exchange and a cause of embarrassment and inconvenience to a substantial number of members."

The Committee then decided that henceforth it would be the policy of the Exchange to "* * * withdraw the registration as odd-lot dealer of any member who transacts odd-lot business at differentials less than those at which the odd-lot business of the Exchange is usually transacted." The effect of this determination, not surprisingly, was that the smaller odd-lot firms were forced to charge the same differential as the odd-lot defendants.

7. The 1938 Committee report, hearings, and the policy generated thereby were never disclosed to the public. Indeed, the Commission, which was not notified by amendment to the Exchange's registration statement or by any other official means, apparently first became aware of this policy during the course of its Special Study investigations.

8. While there has been no price competition between odd-lot firms since 1938, the firms have competed in terms

of services provided for commission houses. The benefits of these services, which include interest free loans and market information, enure to the commission houses rather than to investors. On the other hand, the differentials, which are not paid by commission firms, affect only the investing public.

9. The 1938 Committee policy or "ruling" had a devastating effect upon the smaller odd-lot firms which did not have the resources to compete with the odd-lot defendants in services and thus were dependent upon some sort of price competition in order to attract and maintain business. The Exchange policy, which foreclosed price competition, insured the ultimate demise of the smaller odd-lot firms.

10. In 1941, the odd-lot dealers decided to increase the differential on stock selling below *$1.00*. Upon receipt of notice of this increase from the Exchange, the Commission inquired as to whether public disclosure of the new differential would be announced to the public. In response to this query the Exchange replied as follows:

> "The Exchange has not had, nor does it now have, any rules fixing the differential at which odd-lot dealers in 100 share unit stocks should deal, since this has been and is regarded solely as a matter between the odd-lot dealers and the commission houses with which they deal. Therefore, it is felt that it would be inappropriate for the Exchange to take any action with respect to either approving or disapproving the present proposed change."

11. In 1950, the Commission's then Director of the Division of Trading and Exchanges wrote the Exchange: "[W]e feel that the Exchange should consider the advisability of adopting rules, regulations, or interpretations

reduced to writing which would govern the existing operational methods" of the odd-lot dealers. The Exchange replied that it was reluctant to do so and the matter was dropped until the Exchange adopted Rule 125 at the Commission's request in 1964.

12. Prior to July, 1951, odd-lot firms charged a differential of ⅛ point on all stock selling for more than $1.00. In 1947, the odd-lot defendants began discussing the feasibility of increasing the differential. By December, 1950, the odd-lot defendants had agreed between themselves to increase the differential to ¼ point on all shares selling for more than $60.00. The proposed $60.00 breakpoint was informally presented by the odd-lot defendants to the Exchange, but was not mentioned to the other firms also engaged in odd-lot transactions over the Exchange. The Exchange disclaimed jurisdiction over the proposed differential increase but informally expressed the opinion that it had no objection to its implementation. Thereupon, the odd-lot defendants decided to seek approval of their proposed increase of differentials from the Commission. Accordingly, they jointly hired counsel who presented their case to the Commission. While doubting that it had jurisdiction, the Commission stated that it had no objection to implementation of the new differentials.

13. The odd-lot defendants, realizing that they would lose business if odd-lot firms on other exchanges continued to charge a lower differential, sought to have the other exchanges raise their differentials to accord with their own. The odd-lot defendants turned first to the Midwest Exchange ("Midwest"), which had been considering conversion to a decimal differential system which, in some cases, would have offered cheaper rates to investors. Midwest, which had its own reasons for wanting a decimal system,

at first refused to accept the differentials proposed by the odd-lot defendants. After protracted and fruitless negotiations, the odd-lot defendants told Midwest that they would be willing to drop the breakpoint below $60.00 but, if Midwest did not come to terms, they would increase their differential only on stock not traded over regional exchanges—thereby increasing their profits without conferring benefit upon members of Midwest and other regional exchanges. Midwest capitulated and agreed with the odd-lot defendants to accept a breakpoint of $40.00.

14. As a part of their agreement, Midwest undertook to insure that all of the western exchanges would agree to charge the new differential with the $40.00 breakpoint. The odd-lot defendants agreed to see to it that the eastern exchanges did likewise. The president of Midwest also sought Commission approval for the new rates to be charged on all exchanges. On July 16, 1951, the Commission advised that it would not object to a $40.00 breakpoint.

15. Of all the regional exchanges approached by Midwest and the odd-lot defendants, only the Boston Exchange ("Boston") refused to raise its differentials. Boston's members reasoned that if their odd-lot differentials were lower, they might expect additional odd-lot business to come their way. Accordingly, on July 9, 1951, the Boston odd-lot traders unanimously resolved that they would not increase their differentials.

16. The president of the Boston Exchange informed the Exchange that Boston would not advertise its lower differential in order to increase its odd-lot business. Boston's president has testified on another occasion that he made this promise in fear of retaliation from the Exchange. This concern stemmed in part from the Exchange's threat

in 1940 to restrict the use of its members' funds in odd-lot transactions on other exchanges. Furthermore, many of Boston's members relied upon the Exchange for financing, up to date price quotations and the clearing facilities of various dual memberships.

17. On the regional exchanges, odd-lot transactions are handled by stock specialists instead of specialized odd-lot firms as they are on the Exchange. Odd-lot business is very important to these regional specialists and to the exchanges on which they operate. For example, while odd-lot transactions accounted for about 10% of the Exchange's business, they approximated 48% of Boston's share volume.

18. On July 20, 1951, representatives of the odd-lot defendants and the Exchange met to discuss notice of the increased differentials. At this meeting, the Exchange disassociated itself from the release, but agreed to respond to public inquiry concerning the increase. In order to be able to answer such questions, the Exchange, which theretofore apparently had neither sought nor received any data to support the new differentials, requested that the odd-lot defendants furnish information in support of the increase at that late date.

19. Shortly before the increase was publicly announced, the then existing smaller odd-lot firms trading over the Exchange were informed for the first time of the raised differentials and asked to sign the announcement. One such firm refused to sign, but, fearful that it would be suspended in accordance with the 1938 Committee policy, went along and charged the increased differential.

20. On July 25, 1951, the odd-lot firms issued a release addressed to member firms of the Exchange announcing

that they were going to charge new differentials. This release apparently invited no public discussion and none ensued, perhaps because the release was virtually simultaneous with the effective date of the increase.[2]

21. In August, 1951, the Boston Exchange, despite its ban on advertising, began to experience an increase in odd-lot business. This created some dissention in the Boston ranks. Some of the Boston dealers, particularly the smaller ones, began to urge advertisement of the lower differentials in effect on their exchange in order to increase business. The larger Boston brokers, who had dual memberships and were more sensitive to pressure from the Exchange, advocated that Boston's differential be raised to correspond with that charged elsewhere.

22. In October, 1951, the Boston Governing Committee polled its members to see whether Boston should also raise its differentials. The result of the poll was 42 to 41 in favor of retention of the ⅛ point differential. Nevertheless, Boston raised its rates shortly thereafter, claiming that the dealers who had voted for the higher differential, although numerically a minority, actually conducted 75% of the odd-lot business.

23. In 1956, the Exchange engaged Ebasco Services, Inc. to study Exchange methods and make proposals for their modernization. In due course, Ebasco studied odd-lots and made proposals for modernization of odd-lot procedures. The odd-lot defendants, fearing a decrease of the differential among other things, opposed the Ebasco proposals and succeeded in defeating implementation thereof.

2. Nowhere in the evidence before me do I find the full text of the July 25, 1951 release or the effective date of the new differentials. I infer, however, from the *SEC Special Study* and the portion of the release contained therein, that notice of the new differentials and the implementation thereof were nearly, if not actually, simultaneous. SEC, *Report of Special Study of Securities Markets,* H.R. Doc. No. 95, Pt. 2 at 183 (1963).

Although the differentials were reduced in 1966, the Ebasco proposals, which would have substantially cut the costs of odd-lot transactions, remain unconsidered and unimplemented.

CONCLUSIONS OF ULTIMATE FACT AND LAW

1. The odd-lot defendants fixed the differentials or prices, to be charged in odd-lot transactions over the Exchange. These rates which were fixed in 1951 were in effect until 1966.

2. The odd-lot defendants fixed the differentials to be charged on other exchanges in 1951. These differentials were also in effect in the early 1960's.

3. The Exchange was an active participant in these price fixing arrangements. This participation took the form of failure to regulate, acquiescence in the increase, and maintenance of its 1938 policy of enforcing the odd-lot defendants' rates upon others.

4. Plaintiff and the class have established that they may likely carry their burden of producing evidence that the defendants fixed prices. Under the *per se* rule, once this showing has been made, judgment must follow and the court need not consider any defenses such as the reasonableness of the price formula or the fact that the public has not been harmed. *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950); *U.S.* v. *Trenton Potteries*, 273 U.S. 392 (1927).

5. Defendants urge this court to apply the rule of reason, which "* * * permits the courts to decide whether conduct is significantly and unreasonably anti-competitive in character and effect." *Report of The Attorney Gen-*

eral's National Committee To Study the Antitrust Laws, 11 (1955). The rule is not, however, unlimited in scope and will operate to excuse only conduct that can be shown to be incidental or ancillary to competition. See, e.g. *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 (1933). The rule of reason almost certainly is inapplicable to this case, however, since price fixing agreements are conclusively presumed anti-competitive in both purpose and effect. See *United States* v. *Trenton Potteries, Co., supra* at 396-398. "In such cases, inquiry under the Rule of Reason is over once it has been decided that the conspiracy or agreement under review in fact constitutes price rigging * * *" *Report of the Attorney General, supra* at 11.

Defendants also argue that application of the rule of reason to an allegedly analogous situation in *United States* v. *Morgan,* 118 F. Supp. 621, 688-691 (S.D.N.Y., 1953) indicates that it should pertain here. In *Morgan,* however, Judge Medina found that the restraints there at issue affected neither competitors nor market prices. *Ibid.,* 118 F. Supp. at 689. Because the facts here tend to show that competitors and market prices were directly affected, *Morgan* may be said to stand for the proposition that the rule of reason should be applied to this case.

6. The defendants also claim that they are immune from anti-trust liability as theirs is a regulated industry. Specifically, defendants argue that insofar as the Exchange is vested with self-regulatory powers, its approval of the differentials protects both it and the odd-lot defendants from anti-trust scrutiny. While *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), which held that self-regulatory acts by the Exchange are exempt from antitrust laws only to the extent necessary to effectuate the purposes of the Exchange Act, might be read to refute this claim without more, defendants strike two separately stated

arguments off the *Silver* analysis. First, they urge that because the effect of self-regulatory acts must be investigated to ascertain whether they are necessary to fulfill the commands of the Act, it follows that the *per se* rule cannot be applied at all. This view, as defendants see it, is supported by *Kaplan* v. *Lehman Bros.*, 250 F. Supp. 562 (N.D. Ill., 1966), aff'd. 371 F.2d 409 (7th Cir.), cert. den. 389 U.S. 954 (1967). Second, it is urged that the violation here complained of, the fixing of odd-lot differentials, is mandated by and necessary to implement the Act.

In my view, these two arguments are logically one—and the latter statement of that one argument is the better articulation. In other words, the question of whether or not the *per se* rule is applicable, see discussion *supra*, is a separate question from that of whether or not the Exchange's regulatory approval of fixed differentials was within the purview of the Act and necessary to its implementation. On the other hand, if defendants are correct that fixing of the differentials with Exchange approval was proper and necessary to implement the Act, they presumably would have a complete defense to this action. For reasons to be hereinafter summarized, it is doubtful that such a defense can be sustained. Certainly, regulation of odd-lot differentials is within the scope of, mandated by and necessary to the implementation of the purposes and intent of the Act. See 15 U.S.C. §§78 and 78s. Further, if the Exchange had exercised its self-regulatory powers by establishing rules in respect to odd-lot differentials, I would assume *arguendo* that review of such rules might be beyond the powers of this court. But the Exchange, by its own admission, failed to establish any rules or regulations with regard to odd-lot differentials. To put the matter bluntly, it is unlikely that this failure or "benign acquiescence" can be considered to constitute regulation mandated by the Act. Even if it could be so considered, such "regulation"

scarcely would be immunized from judicial review. To illustrate, defendants may have failed to consider that when the Exchange exercises its self-regulatory powers, it owes at least its members, if not others, certain procedural safeguards such as notice and the opportunity to be heard. In its "regulation" of odd-lot differentials, the Exchange provided notice to no one and afforded only the odd-lot defendants an opportunity to be heard. Therefore, plaintiff and the class have a powerful claim that "* * * the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation." *Silver, supra,* 373 U.S. at 365.

7. Defendants next argue that the Commission's approval rendered the differentials the "legal" rate and that thus they cannot be held liable, even though that rate was initially fixed in violation of the antitrust laws. *Keogh* v. *Chicago & Northwestern Railroad Co.,* 260 U.S. 156 (1922). It is at least questionable whether the Commission, while doubting its jurisdiction to do so, could grant administrative approval in the sense to which *Keogh* refers. This argument need not be reached, however, since *Keogh* and its progeny are to be applied only "* * * in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321, 351 (1963). Insofar as *Silver, supra,* has made it clear that a "plain repugnancy" does not exist between the Act and the antitrust laws, the *Keogh* doctrine is of no applicability here.

8. Finally, defendants claim that plaintiff and the class are barred from seeking damages since they failed to complain of the differentials to the Commission under the provi-

sions of the Administrative Procedure Act, 5 U.S.C. §8551 *et seq.* While this argument might have some force if that agency could provide the relief here sought, the Commission is clearly powerless to do so. Although the Commission can consider antitrust matters, as can any other regulatory agency, see *The Rules of the New York Stock Exchange,* 10 S.E.C. 270 (1941), it does not have primary jurisdiction thereof. *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F.2d 264, 272 (7th Cir., 1970). Furthermore, the Exchange, which could not be an "aggrieved person", has no standing to commence antitrust suits, see *Hawaii* v. *Standard Oil of California,* No. 70-49 (U.S. Supreme Court, March 1, 1972), and, of course, could not entertain a class suit or award damages. Indeed, the Commission has done all that it could do by requiring the Exchange to establish the Rule which lowered the differential in 1966. To now bar plaintiff from seeking recovery of damages incurred prior to 1966 would be unjust and would needlessly sacrifice "* * * the benefits of competition acknowledged by Congress." *United States* v. *Third National Bank in Nashville,* 390 U.S. 171, 189 (1968).

9. Concerning plaintiff's claim against the Exchange for failure to regulate, the Exchange may well be liable to plaintiff and the class for a violation of its statutory duty to regulate its members, provided that (1) damage can be shown, *Baird* v. *Franklin,* 141 F.2d 238 (2d Cir.) *cert. den.* 323 U.S. 737 (1944), and (2) there is proof that the Exchange either knew or had reason to know that its rules were being violated. *Pettit* v. *American Stock Exchange,* 217 F. Supp. 21, 29-30 (S.D.N.Y., 1963). It has recently been held that the Exchange may also be civilly liable for a failure to regulate its membership under a third party beneficiary theory. *Weinberger* v. *New York Stock Exchange,* 335 F. Supp. 139, 144 (S.D.N.Y., 1971).

Defendant Exchange acknowledges these cases but asserts that they are distinguishable as they all concern the failure of the Exchange to adhere to its own rules and not the failure to create rules. This is likely to be a distinction without a difference. Moreover, the argument ignores the fact that the duty to regulate springs from the Act and not from any rule the Exchange might adopt thereunder. At the very least, the Exchange is under a "* * * twofold duty * * * of enacting certain rules and regulations and of seeing that they are enforced." *Baird* v. *Franklin, supra,* 141 F.2d at 244.

Plaintiff has excellent evidence that the Exchange has not satisfied either of these duties. As has been repeatedly stated herein, no rules concerning odd-lot differentials were enacted or approved by the Exchange, notwithstanding the rather plain requirements of Sections 6 and 19 of the Act. 15 U.S.C. §78f and §78s. The "practices" which the Exchange claims satisfied its duties with regard to the differentials could be interpreted as no more than complicity in the price fixing schemes of the odd-lot defendants or an example of the Exchange's "* * * inability or unwillingness to curb abuses * * *" *Silver, supra* at 351. In sum, plaintiff and the class have a strong case that the Exchange acquiesced to increased differentials with at least constructive knowledge that resulting increased costs to the investing public would benefit only a select few of its members—i.e. that the Exchange condoned one of the very abuses which the Act was passed to curb.

Allocation of Cost of Notice

On the basis of the foregoing, it appears that plaintiff and the class he represents are more than likely to prevail at trial or upon a motion for summary judgment. Rule 56, F.R.Civ.P. I conclude, therefore, that defendants should

bear 90% of the costs of Rule 23 (c)(2), F.R.Civ.P. notice to the class. Of defendants' share, one-half should be borne by the Exchange and one-half by the odd-lot defendants. The remaining 10%, which represents the "hazards of litigation", must be put up by plaintiff.

It is so ordered.

Dated: April 4, 1972

H. R. Tyler, Jr.
U.S.D.J.

Order of the United States Court of Appeals for the Second Circuit Dated May 1, 1972, Granting Motion to Order Transmission of the Record

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of May, one thousand nine hundred and seventy-two.

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated April 11, 1972, to direct the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record of the Clerk of the United States Court of Appeals for the Second Circuit be and it hereby is granted.

Harold R. Medina
J. Edward Lumbard per HRM
Paul R. Hays
Circuit Judges

May 1st, 1972

Defendants' Notice of Appeal from Orders Entered on April 7, 1971 and April 4, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Notice is hereby given that defendants Carlisle & Jacquelin, DeCoppet & Doremus, and New York Stock Exchange, Inc. hereby appeal to the United States Court of Appeals for the Second Circuit from the decisions, opinions and orders entered in this case on April 7, 1971 and April 4, 1972 by Hon. Harold R. Tyler, U.S.D.J., on remand.

Dated: New York, N.Y.
May 2, 1972

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Defendants' Notice of Appeal

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Court of Appeals Order 6/29/72

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of June, one thousand nine hundred and seventy-two.

Morton Eisen, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

Plaintiff-Appellee,

v.

Carlisle & Jacquelin and DeCoppet & Doremus, each limited partnerships under New York Partnership Law, Article 8, and New York Stock Exchange, an unincorporated association,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 16, 1972, to dismiss the appeal from the United States District Court for the Southern District of New York for lack of jurisdiction be and it hereby is denied.

HAROLD R. MEDINA,
J. EDWARD LUMBARD,
PAUL R. HAYS,
Circuit Judges.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 341, 381—September Term, 1972.

(Argued December 12, 1972 Decided May 1, 1973.)

Docket Nos. 72-1521, 30934

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Defendants-Appellees.

Before:

MEDINA, LUMBARD and HAYS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*, holding that suit by investor on behalf of himself and other odd-lot stock investors against major odd-lot dealers on New York Stock Exchange and against New York Stock Exchange, was maintainable as a class action, and, following a preliminary hearing, ordering the defendants to bear 90% of the costs of notice.

The action was originally dismissed as a class action, 41 F.R.D. 147, and this Court reversed and remanded to the District Court for further findings necessary for the class action determination, 391 F.2d 555. Jurisdiction was retained by this Court.

Reversed.

AARON M. FINE, Philadelphia, Pennsylvania (Harold E. Kohn and Allen D. Black, Philadelphia, Pennsylvania, and Mordecai Rosenfeld, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

DEVEREUX MILBURN, New York, N.Y. (Louis L. Stanton, Jr., James E. Massey, and Carter, Ledyard & Milburn, New York, N.Y., on the brief), *for Defendant-Appellee Carlisle & Jacquelin.*

FRANCIS S. BENSEL, New York, N.Y. (Bud G. Holman and Kelley Drye Warren Clark Carr & Ellis, New York, N.Y., on the brief), *for Defendant-Appellee DeCoppet & Doremus.*

WILLIAM E. JACKSON, New York, N.Y. (Russell E. Brooks and Milbank, Tweed, Hadley & McCloy, New York, N.Y., on the brief), *for Defendant-Appellee New York Stock Exchange, Inc.*

MEDINA, *Circuit Judge:*

Sufficient factual background for an understanding of the rulings we are about to make in this extraordinary "class action" is to be found in our first opinion *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555 (1968), often referred

to as *Eisen II*. On that appeal we remanded the case to the District Court for reconsideration and for findings on specific issues and we retained jurisdiction.[1] While enter-

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1 We retained jurisdiction because of the doubt engendered by the phraseology of the "death knell" opinion, *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) (*Eisen I*). We thought this case might be construed as making appealable an interlocutory order dismissing a case as a class action "because no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen," see *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969), but perhaps denying appealability to a similar order holding the case to be a proper class action under amended Rule 23. While the "death knell" doctrine has been criticized by the Third Circuit in *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972), we think the consequences of class action rulings are so serious that these interlocutory orders should be made appealable, provided we adopt the view expressed by Chief Judge Friendly in *Korn* v. *Franchard Corp.*, *supra*, 443 F.2d at 1307, to the effect that this Court should formulate the rule of appealability in such fashion that it "will afford equality of treatment as between plaintiffs and defendants." The same considerations which led this Circuit to apply the rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) in *Eisen I*, also would seem to require a rule allowing a defendant to appeal from an interlocutory order permitting the representative plaintiff to continue the suit as a class action.

The "collateral order" doctrine of *Cohen* is based on the pragmatic view that a decision which finally determines an issue in the case which is crucial to the further conduct of the case, and is collateral to the merits of the action, is to receive immediate appellate review if delay in such review will cause "irreparable harm" to the complaining party. The seeds of *Cohen* were sowed by the Supreme Court as early as *Forgay* v. *Conrad*, 6 Howard 201, 205 when it was said that appealability should be allowed if the effect of an interlocutory order is such that if the order is immediately carried into execution the defendant "may be ruined before he is permitted to avail himself of the right" to appeal. An order sustaining a class action allegation clearly involves issues "fundamental to the further conduct of the case;" (see *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945)); the order is also separable from the merits of the case; and irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23, is evident. By this extension or interpretation of *Eisen I* the rule of finality would be given a "practical

taining grave doubts on the questions of notice and manageability, we thought the original rejection of the case as a class action had been too summary, that improper standards had been applied and inadequate consideration given to the specific requirements of amended Rule 23.

After almost five years the case is before us again. While much of the delay is not attributable to further proceedings bearing on issues arising under amended Rule 23, a very considerable amount of the time of Judge Tyler and of the lawyers for the respective parties has, in this interval of five years, been devoted to hearings, the taking of depositions, and the preparation and filing of various District Court opinions, preceded by briefs and extensive oral arguments. Much of this time was devoted to an effort by Eisen's counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way *must* be found to make the case viable as a class action. In the end Judge Tyler was persuaded that the innovations described by Judge Weinstein in his speeches[2] and in his series of opinions in *Dolgow* v. *Anderson*, 43 F.R.D. 21 (1967); 43 F.R.D. 472 (1968); 45 F.R.D. 470 (1968); 53 F.R.D. 661 (1971); 53 F.R.D. 664 (1971), were authorized by amended Rule 23. These innovations were the preliminary mini-hearing on the merits and the "fluid recovery," both of which will be fully described in due course. It is clear to

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rather than a technical construction," see *Cohen*, *supra*, 337 U.S. at 546; *Gillespie* v. *United States Steel Corp.*, *supra*, 379 U.S. at 152, and we would avoid a possible denial of justice caused by delaying review by permitting an interlocutory appeal of rulings either sustaining or striking class action allegations. (See *Swift & Company* v. *Compania Colombiana*, 339 U.S. 684 (1950); *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507 (1950)).

2 Judge Weinstein's speech on this subject was reported in Weinstein, "The Class Action Is Not Abusive," New York Law Journal, May 1, 1972, p. 1, and May 2, 1972, p. 1.

us that, with or without these innovations, the notice provided by amended Rule 23 to be given "to all members (of the class) who can be identified through reasonable effort" cannot be given, as Eisen refuses to pay or put up any bond to cover this expense, and, if defendants prevail on the merits, they will be unable to recover any amounts expended by them for this purpose. We are also of the opinion that, on the basis of the new evidence now before us, the lawsuit is unmanageable as a class action, and that no preliminary mini-hearing on the merits and no "fluid recovery" procedures are authorized by the text or by any reasonable interpretation of amended Rule 23. Accordingly, we reverse and dismiss the case as a class action. We also vacate the findings of fact and conclusions of law that were made after the preliminary mini-hearing on the merits.

I

The Decision Below—52 F.R.D. 253 (1971)

In 1968, when the case was previously before us, it was estimated by someone that there were 3,750,000 members of the class, consisting of those who had bought or sold odd lots on the New York Stock Exchange in the period from May 1, 1962 through June 20, 1966. It was then doubtful whether any of the members of the class could be "identified through reasonable effort." Eisen's position then was and now is that, except possibly in the eventuality of the ultimate adoption of Judge Tyler's suggested plan which envisages payment by defendants of 90% of the cost of giving notice, he will not defray any of the expense of giving notice to any of the members of the class, nor will he post any bond to reimburse defendants for any of their disbursements, pursuant to any order of the District Court, made for the purpose of giving any notice.

It now appears that there are 6,000,000 members of the class and of these 2,250,000 can be easily identified.[3] Members of the class reside in every state of the United States and most foreign countries. They speak and understand a great variety of modern languages. The damages sought to be recovered were estimated at the time we last considered the case at something between a maximum of $60,000,000 and a minimum of $22,000,000.[4] Now the estimate has been raised by Eisen's counsel to 120 millions of dollars.

In our prior opinion we stated unequivocally that actual notice must be given to those whose identity could be ascertained with reasonable effort and that "in this type of case" plaintiff must pay the expense of giving notice to these members of the class.[5] We further stated that if this

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3 According to the opinion below, the names and addresses of approximately 2,000,000 class members can be identified. In addition, another 100,000 or more had odd-lot transactions in stocks listed on the Exchange through what is called the "Monthly Investment Plan." These individuals can be identified through computer tapes in a manner similar to that used for locating the 2,000,000. Furthermore, another 150,000 or so public individuals had odd-lot transactions in stocks listed on the Exchange through "payroll deduction plans" operated by Merrill Lynch, Pierce, Fenner & Smith, Inc. Their names and addresses can be identified through the records of Merrill Lynch.

4 52 F.R.D. 253, 265 (S.D.N.Y. 1971).

5 We did not in our opinion in *Eisen II* intend our statement that "in such a case as this" plaintiff should defray the cost of notice to be dictum, as has been suggested, see *Berland* v. *Mack*, 48 F.R.D. 121, 131 (S.D.N.Y. 1969). This statement was part of our interpretation of amended Rule 23 as applied in this case, especially with respect to the actual individual notice required by subdivision 23(e)(2) to be given to those members of the class who could be identified. This was part of our instructions to conduct a hearing on the remand and decide whether the requirements of amended Rule 23 had been or could be met.

Nor did we decide or intend to say that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Ex-

could not be done there might be no other alternative than the dismissal of the case as a class action. For some reason not clear to us Judge Tyler disregarded these holdings and concluded that he had discretion, even with reference to those members of the class who could be easily identified, to provide for such notice as he thought to be reasonable in the light of the facts of this particular case.

Thus he directed actual notice only to "the approximately 2000 or more class members who had ten or more transactions during the relevant period" and to "5000 other class members selected at random" from the 2,500,000 class members who could easily be identified.[6] With respect to the rest of the 6,000,000 members of the class, Judge Tyler ordered what, without reciting all the details concerning the schedule of proposed publications, we consider to be a totally inadequate compliance with the notice requirements of amended Rule 23. One of the reasons for this

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change Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F.R.D. 69, 107.

6 Judge Tyler in discussing the notice problems observed that the plaintiff had also offered to send individual notice to all member firms of the New York Stock Exchange and to all commercial banks with large trust departments. This together with the individual notice to the 2000 class members with ten or more transactions and the 5000 selected at random, and the notice by publication, would in Judge Tyler's view "increase the likelihood of reaching a significant portion of the class," and would be in conformity with the requirements of due process.

was perhaps because Judge Tyler thought of these first notices, by mail and by publication, as merely the first of a series of notices. Judge Tyler then deferred the question of who should pay for this first round of notices until after a "brief" preliminary hearing on the merits. This is what is called the "mini-hearing." We shall have more to say later about this preliminary mini-hearing on the merits of Eisen's triple damage antitrust claim. Accordingly, the hearing was held "on the issue of the allocation of the costs of notice" and Judge Tyler concluded that the defendants must bear 90% of these expenses.

To describe Judge Tyler's general scheme as it slowly developed in the series of his many opinions[7] following the remand would be too tedious. The sum and substance of it was that he at last realized that it was highly improbable that any great number of claims would, for a variety of reasons, ultimately be filed by the 6,000,000 members of the class. No claimant in the 6 years of the progress of the action had shown any interest in Eisen's claim. The average odd-lot differential on each transaction had been $5.18. The average individual class member engaging in five transactions would have paid a total odd-lot differential of $25.90. Assuming a 5% illegal overcharge the recovery is approximately $1.30, and when trebled the average class member would be entitled to damages of $3.90. As the costs of administration might run into the millions of dollars, it was not likely that a rush of claimants would eventuate no matter how extensive the publication. As he had surmised in the beginning, and as Chief Judge Lumbard stated in his dissent (*Eisen II*, p. 571), the class action was hopelessly unmanageable. So Judge Tyler tried to pull the case out of this morass by resorting to the "fluid recovery," which had been used as a vehicle for

7 Judge Tyler's opinions following the remand are reported at 50 F.R.D. 471, 52 F.R.D. 253, and 54 F.R.D. 565.

carrying out a voluntary settlement in the *Drug Cases, State of West Virginia* v. *Chas. Pfizer & Co., Inc., et al.*, 314 F.Supp. 710 (S.D.N.Y. 1970).[8]

The concept of this "fluid recovery" is very simple. Having decided that there is no conceivable way in which any substantial number of individual claimants can ever be paid, "the class as a whole" is substituted for the 6,000,000 claimants. Thus the first round of notices becomes relatively unimportant. The scheme adopted envisages the first round of notices as sufficient to get the ball rolling. Little is said about Step Two. This involves a trial of the case to a judge and jury on the merits—not a preliminary mini-trial this time, but a real full scale trial of the private triple damage antitrust case. In some way the damages to "the class as a whole" will be assessed and the defendants, it seems to be assumed, will promptly pay this huge sum into court. This sum is supposed to constitute the "gross damages" to "the class as a whole." With the money in hand, the case begins to resemble the *Transitron* and *Drug Cases* and from then on we are to have the real notices soliciting the filing of claims, the processing of these claims, the fixing of counsel fees and the payment of the general expenses of administration. As "the class as a whole" will include all those who had purchased or sold in the period from mid-1962 to mid-1966 and all those who, at the time of assessing the full damages, were presently purchasing or selling, and those who might in the future purchase and sell, securities in lots of less than 100 shares, it is quite apparent that some of the original 6,000,000 claimants will receive nothing, because they have never heard of the case or for other reasons have failed to file claims and have them processed, and

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8 Judge Wyatt's approval of the settlement was affirmed by this Court at 440 F.2d 1079 (1971).

many other new traders, who had no transactions in the period from mid-1962 to mid-1966, will receive some payments. According to Judge Tyler, at least those members of the original class of 6,000,000 who "have maintained their odd-lot activity, will reap the benefits of any recovery" (52 F.R.D. at p. 265). As far as we are aware there has never been, nor can there ever be, a reliable or even rational estimate of how many traders, whether speculators or investors, can be said to be expected to continue as such after the lapse of 10 years or so. As it is suspected that relatively few claims will be filed and the damages assessed are supposed to cover the losses of "the class as a whole," there will be a huge residue, similar to the amounts paid to various charities "to advance public health projects" in the *Drug Cases,* and this residue is to be used for the benefit of all odd-lot traders by reducing the odd-lot differential "in an amount determined reasonable by the court until such time as the fund is depleted." 52 F.R.D. at p. 265. We are at a loss to understand how this is to be done, but it is suggested that it "might properly be done under SEC supervision or at least with SEC approval."

Despite its early expression of doubt on the subject,[9] and what appears at least to be *de facto* exercise of supervisory powers over Rules or practices on the subject of the amount and uniformity of the rate of commissions on

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9 According to the Report of the Special Study of Securities Markets, Vol. I, p. 182 (1963), an attorney representing the odd-lot firms presented a proposal for an increased differential. The Director of the Division of Trading and Exchange expressed some doubt as to the Securities and Exchange Commission's jurisdiction over the matter. The Report states that "(t)he Commission declined to decide the jurisdictional question but stated that it had no objection to the proposal. It is to be noted that neither the Exchange nor the Commission asserted jurisdiction, the former denying its jurisdiction and the latter expressing doubts, yet each informally acquiesced in the increase." See also p. 200 of the Report.

odd-lot purchases and sales, the SEC finally did exercise such powers[10] and we hold that at all times the SEC possessed such powers under Sections 11(b)[11] and 19(b)[12] of the Securities Exchange Act of 1934. No District Court has authority to decide upon the rate of such commissions to take effect until the exhaustion of any residual fund left over by application of a "fluid recovery" in a private triple damage antitrust case, after the payment of claims in a class action or otherwise. The courts may review rulings of the SEC, but they have no more power than the District Court to fix any such rates in the first place or to give directions to the SEC concerning the fixing of such rates or the time within which such rates are to be effective, as part of a judgment in a private triple damage antitrust case.

II

Disposition of Certain Contentions of the Parties

Solely for the purpose of making our holdings clear in this difficult and complicated case we think it proper first to dispose of certain contentions of the parties.

A

We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to

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10 At the preliminary hearing defendants' Exhibit C contained a letter from the SEC to the New York Stock Exchange dated June 16, 1966. In part the letter stated that the "Commission hereby makes written request pursuant to section 19(b) of the Securities Exchange Act that the Exchange effect on its own behalf changes in its rules and practices in respect of odd-lot purchases and sales, and the fixing of reasonable rates of commission and other changes in connection therewith, to fix odd-lot differentials * * *."

11 15 U.S.C., Section 78k(b).

12 15 U.S.C., Section 78s(b).

side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. See *In Re Antibiotic Antitrust Actions*, 333 F.Supp. 278, 281-2 (S.D.N.Y. 1971).

B

Moreover, we think the three cases cited by Judge Tyler as "respectable precedent" for fluid class recovery are all distinguishable. These three cases are: *Bebchick* v. *Public Utilities Commission*, 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); the *Drug Cases*, 314 F.Supp. 710 (S.D.N.Y.), aff'd 440 F.2d 1079 (2d Cir. 1971); and *Daar* v. *Yellow Cab Company*, 67 Cal.2d 695, 64 Cal. Rptr. 724, 433 P.2d 732 (1967).

Judge Wyatt's extraordinary feat of judicial administration in carrying out the terms of the one hundred million dollar settlement in the *Drug Cases* deserves all the praise it has received. But it was a consensual affair made possible by the agreement of the parties and without objection to the assumption by the District Court of jurisdiction to accept and administer the fund. Here we have no fund. There is no settlement. Every issue is contested and liti-

gated. And authority to permit this action to proceed as a class action must be found within the four corners of amended Rule 23, as interpreted in the Reviser's Note. Applying this test we hold Eisen's class action must be dismissed. *Bebchick* was not a class action in any sense of the word. Amended Rule 23 was not involved. In the exercise of its powers of review, the Court of Appeals for the District of Columbia Circuit reversed a judgment of the District Court approving the action of the Public Utilities Commission of the District of Columbia supporting a fare increase by the transit company. In the meantime, the additional cash fares, now found to be illegal, had been collected. There was no way to direct refunds as those who paid these cash fares could not be identified. So, also in the exercise of its powers of review the Court of Appeals directed the amount of these additional cash fares to be set up in the books of the transit company to be used, in the discretion of the regulatory commission "to benefit bus riders as a class in pending or future rate proceedings." We cannot find that this case has any bearing on any of the issues in this amended Rule 23 case. Finally, *Daar* was a case arising under a state class action statute very different in its phraseology from amended Rule 23. The ruling was made on a demurrer to the complaint so the approach to the legal issues was entirely different from the making of a judicial determination, on the basis of proof, of whether or not the requirements of amended Rule 23 had been met. Moreover, the court was evidently of the view that the individuals who had been damaged by the alleged overcharge in taxi fares would ultimately have to prove their separate and individual damages. 433 P.2d at 740.

For the reasons stated in this opinion we disagree with the holding in the *Dolgow* cases.

C

The Merits of Eisen's Triple Damage Antitrust Claim

The defendants by extensive and even cogent arguments have urged us not only to vacate Judge Tyler's findings and conclusions on the merits of the case but to decide that there is no merit in Eisen's antitrust claim. Thus the defendants argue that in the context of an antitrust suit brought against defendants acting within a self-regulatory industry the *per se* rule of antitrust liability is inapplicable, and that even under a rule of reason the practices of the odd-lot defendants and the Exchange were not violative of the antitrust laws. In essence the defendants contend that Judge Tyler incorrectly applied the *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) doctrine, and should have concluded that the fixing of the odd-lot differential is necessary to the proper implementation of the Securities Act. Also the defendants assert that the Securities and Exchange Commission has primary jurisdiction over the substantive issues presented in this litigation. As already appears in this opinion, we hold and decide that the SEC does possess supervisory powers over the amount and uniformity of the commissions to be paid on odd-lot purchases and sales. But this is only part of the picture. There are many facets to this complicated case. We feel it is proper for us to say only that the record before us constitutes no proper basis for any decision of the merits, tentative or otherwise.

III

Controlling Principles

When discoursing on the arts or belles-lettres colorful language stimulates the imagination, beguiles one into useful symbolism and opens up the avenues to creative thought.

But in the process of rationalizing legal conclusions and arriving at a sound and proper determination of questions of the interpretation of statutes, procedural rules and constitutional limitations, clichés and rhetorical devices generally miss the mark. Something more substantial is necessary to establish a base for the proper decision of difficult and complex questions of law. One reason for this is that the solution is found more often than not by the application of fundamentally simple principles.

Thus statements about "disgorging" sums of money for which a defendant may be liable, or the "prophylactic" effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, but to do this by applying settled or clearly stated principles of law, rather than by some process of divination. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and

salutary protections against oppressions,[13] including oppressions by those whose intentions may be above reproach.

We adhere to what we have written in support of the remand of this case in *Eisen II*. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that "such rules shall not abridge, enlarge or modify any substantive right." [14]

The applicable substantive law is Section 4 of the Clayton Act[15] that authorized the private triple-damage antitrust suit to recover damages by a person who has been "injured in his business or property" by reason of a violation of the antitrust laws. That the claims of many may not be treated collectively or as "the class as a whole" is what the Supreme Court decided in *Snyder* v. *Harris*, 394 U.S. 332 (1969), where plaintiff, in a diversity case sued as representative of a class of some 4000 shareholders of an insur-

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13 The procedural safeguards we speak of were wisely embodied in the Fifth Amendment's Due Process Clause. The importance of due process of law and procedural fairness has been emphasized by some of our leading jurists. Justice Brandeis observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." (*Burdeau* v. *McDowell*, 256 U.S. 465, 477 (1921) (dissenting opinion)). Justice Frankfurter also remarked that "(f)airness of procedure is 'due process in the primary sense * * *.' It is ingrained in our national traditions." (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 161 (1951) (concurring opinion)).

14 28 U.S.C., Section 2072.

15 15 U.S.C., Section 15.

ance company. Her individual claim was for less than $10,000. She was not permitted to aggregate her claim with the separate claims of the other members of the class which amounted to $1,200,000. Despite the fact that amended Rule 23 was already in effect, the case was dismissed. Moreover, in the recent case of *Hawaii* v. *Standard Oil Co. of California, et al.*, 405 U.S. 251 (1972),[16] it was again held that only persons actually injured in their business or property could claim damages under the Clayton Act.

Eisen also alleges that the Exchange is liable for its failure to regulate the odd-lot differential as required by Section 6 of the Securities Exchange Act. He argues that Section 6, 15 U.S.C., Section 78f, requires the securities exchanges to prescribe rules and regulations for the regulation of the industry. Failure so to regulate allegedly subjects the defendant-Exchange to liability to those who have suffered injury due to the abdication of this regulatory responsibility. The duty to regulate emanates from the Exchange Act, but the right of an injured party to recover damages is, according to Eisen, based upon federal common law, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), cert. denied, 323 U.S. 737 (1944). Thus, if Eisen is correct and Section 6 of the Act creates a statutory duty on the Exchange to protect members of plaintiff's class, then these members "may sue for injuries resulting from its breach and (the) common law will supply a remedy if the statute gives none," *Baird* v. *Franklin*, 141 F.2d at 245.

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16 The District Court in *Hawaii* v. *Standard Oil Co.*, 301 F.Supp. 982 (D.Hawaii, 1969) dismissed the class action allegation on the ground that "under the circumstances * * *, the class action based upon the injury to every individual purchaser of gasoline in the State, * * * in the context of the pleadings, would be unmanageable." Hawaii, however, decided not to appeal this ruling to the Ninth Circuit, and, of course, the ruling was not before the Supreme Court for review in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 256, n.6 (1972).

The fundamental doctrine that permeates our opinion in *Eisen II*, and which we are now about to apply again in this same case, is whether the requirements of amended Rule 23 have been met. We find no helpful analogy in the procedures that have been used for generations in connection with preliminary injunctions or other provisional remedies intended to preserve the *status quo*.

So, we shall proceed to examine in some detail the provisions of amended Rule 23 in the light of the long and explicit Advisory Committee's Note, 39 F.R.D. 98, and decide whether or not Judge Tyler has followed our directions to appraise and to apply each of the factors enumerated on the face of the Rule. In the light of our conclusions with respect to notice and manageability, we do not reach the subject of adequate representation.

IV

Lack of Individual Notice to "All Members Who Can be Identified Through Reasonable Effort"

Our prior ruling in *Eisen II* is clear and specific. If identification of any number of members of the class can readily be made, individual notice to these members must be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action. Amended Rule 23(c)(2) unambiguously states that notice to the class generally shall be the "best notice practicable," and then "including individual notice to all members who can be identified through reasonable effort." Moreover, the Advisory Committee's Note states (39 F.R.D. 106-7): "Indeed, under subdivision (c)(2), notice must be ordered, it is not merely discretionary * * *." [17] While Judge Tyler seems

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17 The *Drug Cases*, *supra*, 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir. 1971), contain nothing that gives support to Judge

to have realized that this phase of amended Rule 23 has decided constitutional overtones, he apparently thought the flexibility of the Rule and our statement that the Rule was to be given a liberal interpretation authorized him to exercise his discretion even if this involved the complete disregard of our specific and unambiguous ruling on the subject of actual individual notice to identifiable members of the class. This ruling alone compels a reversal of the order appealed from and the dismissal of the case as a class action.

V

The Preliminary Mini-Hearing on the Merits Was Not Authorized by Amended Rule 23 and the District Court Had No Jurisdiction or Competence to Hold Such a Hearing

The Federal Rules of Civil Procedure set forth a considerable variety of procedural devices designed for the disposition of cases on the merits. There may be traditional trials to a judge or to a judge and jury; there may be summary judgments, dismissals with or without prejudice for failure to state a claim and so on. But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift

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Tyler's ruling that individual notice to a limited number of members of a group of 2,250,000 whose names and addresses were identified was sufficient compliance with the notice requirements of amended Rule 23. An examination of the briefs in the *Drug Cases* makes it clear that reasonable effort would not have uncovered the names and addresses of the members of the consumer class of persons who bought the drugs on prescription at drug stores. Therefore, publication as to the consumer class was deemed sufficient. Moreover, as appellant in the *Drug Cases* attacked the sufficiency of the notice to the members of the wholesaler-retailer class, this Court rejected this argument, observing that individual notice was sent by mail to each and every member of this class whose name was available. 440 F.2d at 1091.

determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.

We agree with the ruling by the Fifth Circuit in *Miller* v. *Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971), that the preliminary hearing on the merits was improper. As stated by Judge Wisdom, 452 F.2d at page 427:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

This was the first time, as far as we are aware, that any Court of Appeals has passed on the point. As noted by Judge Wisdom in footnote 5 on page 429 of 452 F.2d, this Court did not have occasion to rule on the question when it decided the appeal from Judge Weinstein's summary judgment for defendants in *Dolgow*, 438 F.2d 825 (2d Cir., 1971). While Judge Weinstein's oral order not only granted summary judgment for defendants but also held the case not to be a proper class action, the posture of the case on the appeal to our Court was such that the Court had no occasion to consider the propriety of the preliminary mini-hearing on the merits that had been conducted by Judge Weinstein. Nor was that question before this Court in *Green* v. *Wolf Corporation*, 406 F.2d 291 (1968). See footnote 15 on pages 301-2.

Of the few District Court decisions on the point most of these disagree, as, of course, does the Fifth Circuit, with the innovations described in *Dolgow*,[18] and there is little to commend the reasoning or lack of reasoning in the others.[19] No provision is made in amended Rule 23 for any such mini, preliminary or other hearing on the merits. It does violence to the whole concept of summary judgment, and cannot be reconciled with the requirement in Rule 23 that "as soon as practicable after the commencement of the action" the question of class suit *vel non* be decided.

Moreover, in this case we did not in our disposition of the prior appeal intend to relinquish to the District Court any jurisdiction to pass on the merits of the case but only to decide if the requirements of amended Rule 23 had been met. Accordingly, we are constrained to hold that the whole preliminary mini-hearing on the merits proceeding, including the findings of fact and conclusions of law, was conducted and made without jurisdiction.

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18 Decisions which have rejected the use of a preliminary hearing on the merits to decide the propriety of litigation proceeding as a class action include: *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), cert. denied 398 U.S. 950 (1970); *Katz* v. *Carte Blanche Corp.*, 52 F.R.D. 510 (W.D.Pa. 1971); *Fogel* v. *Wolfgang*, 47 F.R.D. 213 (S.D.N.Y. 1969); *Cannon* v. *Texas Gulf Sulphur Co.*, 47 F.R.D. 60 (S.D.N.Y. 1969); *Mersay* v. *First Republic Corp. of America*, 43 F.R.D. 465 (S.D. N.Y. 1968). Judge Mansfield took the opportunity in *Berland* v. *Mack*, 48 F.R.D. 121, 132 (S.D.N.Y. 1969) to comment on the preliminary hearing on the merits: "The suggestion that such abuse of the corporate treasury can be avoided by a preliminary hearing to determine the merits of the claim is illusory. Quite aside from the additional burden that it heaps upon the Court, it would be a rare case where the Court could assure the class of ultimate success even after a preliminary hearing."

19 Cases supporting a preliminary hearing on the merits are *Milberg* v. *Western Pacific Railroad Co.*, 51 F.R.D. 280 (S.D.N.Y. 1970), appeal dismissed, 443 F.2d 1301 (2d Cir. 1971), and, of course, *Dolgow* v. *Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

VI

As a Class Action the Case Is Unmanageable

From the beginning it has been Judge (then Chief Judge) Lumbard's view that as a class action the case is unmanageable and that it should be dismissed as a class action. It turns out that he was right. As soon as the evidence on the remand disclosed the true extent of the membership of the class and the fact that Eisen would not pay for individual notice to the members of the class who could be identified, and the evidence further disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class, a ruling should have been made forthwith dismissing the case as a class action. This dismissal could have saved several years of hard work by the judge and the lawyers and wholly unnecessary expense running into large figures. The fact that the cost of obtaining proofs of claim by individual members of the class and processing such claims was such as to make it clear that the amounts payable to individual claimants would be so low as to be negligible also should have been enough of itself to warrant dismissal as a class action. Other cases involving millions of diverse and unidentifiable members of an alleged class had been dismissed as unmanageable or altered in composition.[20] And so even *Eisen* and his counsel conceded that

20 See, *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971); *United Egg Products* v. *Bauer International Corp.*, 312 F.Supp. 319 (S.D.N.Y. 1970); *Hackett* v. *General Host Corp.*, Civil No. 70-364 (E.D.Pa. 1970), appeal dismissed, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 461 (E.D.Pa. 1968); *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F.Supp. 1001 (E.D.Pa. 1967).

the class was not manageable unless the "fluid recovery" procedures were adopted.

Thus, in the language of Eisen's counsel:

> There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable. The facts in Stipulation No. 2 only underscore the obvious. In both Cherner v. Transitron Electronic Corporation, 201 F.Supp. 934 (D. Mass. 1962) and Illinois Bell Telephone Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939). (the cases included in Stipulation No. 2), the refund process overwhelmed the refunds. And both cases involved, quite obviously, classes much smaller than the class at bar.

Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce.[21] And, when it comes to the filing and processing of claims, lawyers specializing in class actions have stated that the only effective way to induce any reasonable number of members of the class to file claims is to conduct full-scale campaigns on TV and radio, solicit appearances by advocates of consumers' rights such as Ralph Nader, letters from Congressmen to their constituents, public statements by various state attorneys general "and coverage in various news media, union newsletters and the like," also to persuade the Federal Communications Commission

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21 Notice by publication has been sanctioned as consistent with due process of law under certain circumstances, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). But in *Schroeder* v. *City of New York*, 371 U.S. 208, 212-213 (1962) the Court refined the *Mullane* rule: "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."

to classify announcements of this character as "public service announcements." [22]

All the difficulties of management are supposed to disappear once the "fluid recovery" procedure is adopted. The claims of the individual members of the class become of little consequence. If the damages to be paid were only the aggregate of the sums found due to individual members of the class, after their claims had been processed, it is fairly obvious that in cases like *Eisen* the expenses of giving the notices required by amended Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get nothing.[23] We referred to this possibility in our opinion in *Eisen II* at pages 567 and 570.

But if the "class as a whole" is or can be substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous, affording, we are told, plenty of money to pay all expenses, including counsel fees, and a residue so large as to justify reduction of the odd-lot differential for years in the future, for the benefit of all traders, past, present and future, who are to be considered to be members of "the class as a whole."

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22 These suggestions were made and discussed in Shapiro, "Consumer Participation in Antitrust Class Action Part II", New York Law Journal, May 31, 1972, p. 1.

23 The recent draft for the *Manual for Complex Litigation* suggests that problems of administering the class action should not justify denial of an appropriate class action request "except when the attention and resources required to be devoted strictly to administrative matters will frustrate the securing of ultimate relief to which the class members may be entitled." (p. 36). Due to our rejection of the fluid class recovery concept, we are compelled to conclude that this litigation falls squarely within this exception contemplated in the Manual. The administrative problems posed by this action will frustrate any effort to provide the individual class members with compensation for the alleged injuries.

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

VII

A Few General Observations

Perhaps in part due to the liberal views on the subject of amended Rule 23, as expressed in our opinion in *Eisen II*, and doubtless stimulated by the counsel fees allowed in the *Transitron* and the *Drug Cases*, where large voluntary settlements had been approved and administered by District Judges, there has followed such a quantity of comment pro and con on the questions of law we are to decide in this case, by law professors, by judges, and especially by lawyers specializing in class actions, expressed in numerous articles, opinions and published speeches, that the task of even attempting to enumerate all of these for purposes of documentation is too much for us.

Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual members of the class, a champion steps forth. Thus class actions have been brought "on behalf of all subscribers of business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a given state or states, all homeowners in the United States, and

even all people in the United States." [24] So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits. But the preliminary procedures, including the preliminary mini-hearing on the merits, such as those conducted by Judge Tyler in order to decide whether or not this case was a proper class action, and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.[25]

The *"in terrorem"* effects of the innovations described in *Dolgow* have been highly praised by those who invented or applied them.[26] But Professor Milton Handler, whose Annual Antitrust Review has for many years brought his expertise in Trade Regulation and, we are happy to say, some entertainment to the members of the Association of the Bar of the City of New York, and to the members of the Bench and Bar in general, minces no words. He calls these procedures "legalized blackmail." [27] There is reason

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24 In the Report and Recommendations of the Special Committee of the American College of Trial Lawyers on Rule 23 of the Federal Rules of Civil Procedure, issued March 15, 1972, this quotation appears on p. 6 with supporting citations.

25 *Id.*, at 16. See also, *Morris* v. *Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971).

26 See, *Dolgow* v. *Anderson*, 43 F.R.D. 472, 487 (E.D.N.Y. 1968); Miller, *Problem In Administering Relief In Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 508; Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 Bus. Lawyer 1259 (1970).

27 Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971). See also, Professor Handler's 24th Annual Antitrust Review, 72 Colum. L. Rev. 1, 34-42, in which he criticizes the fluid

to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner.

And yet, even if amended Rule 23 furnishes no satisfactory solution in situations where immense numbers of consumers have been mulcted in various ways by illegal charges, it would seem that some means should be provided by law for the redress of these wrongs to the community and to society as a whole. The numerous decisions by courts in these class action cases have at least exposed the lack of adequate remedy under existing laws. From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent.

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recovery procedure as sought to be applied in "class" actions. There are some additional trenchant comments in his 25th Annual Antitrust Review, published in the December, 1972 issue of The Record of the Association of the Bar of the City of New York, pp. 660 ff.

Another possibility, suggested by the Report and Recommendations of the Special Committee of the American College of Trial Lawyers, is a further amendment to amended Rule 23 consisting of a new subdivision providing:

> In an action commenced pursuant to subdivision (b)(3), the court shall consider whether justice in the action would be more effectively served by maintenance of the action as a class action pursuant to subdivision (b)(2) in lieu of (b)(3).

The procedure involved in applying for prospective injunctive relief is relatively simple and inexpensive, social and economic reforms may be implemented and an end put to illegal practices with far more benefit to the community than that derived from minimal or token payments to individual members of a class. Attorney's fees in such cases should also provide adequate incentive to counsel for the representative or representatives of the class.[28]

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28 In his recent book FEDERAL JURISDICTION: A GENERAL VIEW, containing his 1972 Columbia University James S. Carpentier Lectures, Chief Judge Friendly makes this comment on class actions pursuant to amended Rule 23, at page 120, omitting footnotes:

> Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multi-million dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrong-doing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention.

Conclusion

For the reasons stated in this opinion the findings and conclusions following the mini-hearing are vacated and set aside, the various rulings of the District Court sustaining the prosecution of the case as a class action are reversed and, as a class action, the case is dismissed, without prejudice to the continuance of so much of the claim asserted in the complaint as refers to Eisen's alleged individual rights against the defendants.

HAYS, *Circuit Judge*, concurring in the result:

I concur in the result because I am unable to accept the ruling of the district court requiring the defendants to pay 90 per cent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure.

Court of Appeals Opinion 5/24/73 on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. 341—September Term, 1972.

(Filed May 14, 1973 Decided May 24, 1973.)

Docket No. 72-1521

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiff-appellee, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Judges Hays, Oakes and Timbers dissent.

/s/ HENRY J. FRIENDLY
Chief Judge

KAUFMAN, Circuit Judge, with whom Judges FRIENDLY, FEINBERG, MANSFIELD, and MULLIGAN, concur.

I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. Judge Oakes's opinion, dissenting from the denial of en banc, illustrates some of the far-reaching implications the panel's opinion might have on the initiation and administration of certain class action litigation in the future. En banc consideration by this court, however, would merely serve as an instrument of delay. Moreover, the application for certiorari will not go to the Supreme Court barren of the views of the judges of this court as, for example, in the Pentagon Papers case, where the court convened en banc but, because of urgent time considerations, did not write opinions. Judge Oakes has set forth his views on the merits with vigor and Judge Medina's panel opinion articulates the opposing position. Our decision to decline en banc consideration of this case in no way implies, as my brother Oakes suggests, the demise of en banc in future cases of exceptional importance; nor does it threaten to turn this collegial court into a fragmented judicial body of panels of three, in which each panel's opinions speak only for the panel, and not for the whole Court. Instead, we wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration.

Concurring Opinion of Judge Mansfield
Dissent of Judge Hays
Dissenting Opinion of Judge Oakes

MANSFIELD, *Circuit Judge:*

I concur in Judge Kaufman's opinion.

The issues raised by this appeal are of exceptional importance and therefore deserving of the most authoritative resolution possible. If the recent history of *en banc* proceedings in this Court is any indication, however, an *en banc* hearing would result in opinions expressing diverse views, necessitating ultimate resolution by the Supreme Court. See, e.g., *Rodriguez* v. *McGinnis,* 456 F.2d 79 (2d Cir. 1972), *reversed sub nom. Preiser* v. *Rodriguez,* 41 U.S.L.W. 4555 (May 7, 1973). In the meantime one year's delay would be added to this already protracted proceeding. This predicament might be avoided by granting the petition and, with the case then before us *de novo,* invoking the Supreme Court's jurisdiction through the rarely used procedure provided by 28 U.S.C. §1254(3), which empowers us *sua sponte* to certify grave questions to it for final decision where we believe the answers to be in doubt. See 28 U.S.C. Rules 28-29, Revised Rules of the Supreme Court (1973 Supp.); *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, 728-29 (1929). However, since I am persuaded that the Supreme Court, in view of the far-reaching significance of the issues, will in all likelihood grant certiorari, I believe that such a procedure is unnecessary. Otherwise I would agree with Judge Oakes' forceful plea for an *en banc* hearing.

HAYS, *Circuit Judge,* dissenting:

I believe that this case should be reconsidered en banc.

OAKES, *Circuit Judge* (dissenting from the denial of rehearing en banc), with whom Judge Timbers concurs:

For this court not to hear a matter of this significance is to render the en banc statute[1] a nullity. One may in this era of burgeoning appellate business quite plausibly take the view that the en banc procedure should not be used "merely" to correct individual injustices[2] or mistakes, but only in a case where the panel decision[3] is in serious conflict with prior decisions of the particular Circuit Court of Appeals or where it is of extreme importance. Even with that view, however, this case, if no other decided in recent years, qualifies for en banc treatment. I say this for the following reasons which I will enumerate, adding a few comments subsequently:

1. The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens.

2. The panel opinion reaches a result which is very doubtful to say the least; on its face the opinion appears to nullify much of Fed. R. Civ. P. 23.

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1 Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

28 U.S.C. § 46(c).

2 Occasionally a vote to rehear a panel opinion en banc has been effective in the administration of individual justice. *See United States ex rel. Whitmore v. Malcolm*, No. 72-1706 (2d Cir., Jan. 22, 1973), slip op. at 1615 (2-1 decision), where following this court's vote to rehear en banc a panel opinion affirming a denial of habeas corpus and with the rehearing en banc pending before us, the State prosecutor dismissed the case against the appellant, thereby mooting the appeal.

3 I speak of a panel decision as one by three judges sitting on a Court of Appeals.

3. The case should be heard en banc; the procedure is there and presumably is to serve some purpose, and the Supreme Court has admonished the Courts of Appeal to make use of it.

4. There are no compelling reasons for not hearing the case en banc.

The Case Is of Extreme Importance; It Vitally Affects Class Actions.

I would expect that the case would be conceded by each and every one of the judges voting to deny en banc treatment, if he were polled, to be of extreme importance. Judge Kauman's opinion makes this concession.

The panel opinion defines as unmanageable any case involving a large class where actual notification of readily ascertainable members is expensive. It calls notice by publication to a large class a "farce" and casts constitutional doubts on any other construction of Rule 23. The case accordingly affects adversely much consumer and environmental litigation, as well as all antitrust and other claims by numbers of little people for small amounts.[4] The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items

4 I say "little people" because bigger investors don't generally deal in odd lots. They prefer to avoid the price differential in brokerage fees dealing in lots of 100 or more. It is interesting to contrast this case with *Lanza* v. *Drexel*, No. 35794 (2d Cir., Apr. 26, 1973), slip op. at 3033 (en banc), where this court did en banc and reverse a panel ruling that had a bearing, although in quite a limited factual situation in my opinion, on the liability for Securities Act violations of directors unconnected with management but highly involved financially. The panel opinion's decision here was partially reached in the name of fairness to defendants who thereby may retain, if the plaintiff's allegations are proven, profits obtained by violation of the antitrust laws. As I compute the cost of mailing readily identifiable members of the class from Judge Tyler's opinion, it was just over ten cents apiece or $218,750. 52 F.R.D. at 263.

selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance.

The Panel Opinion Reaches a Very Doubtful Result.

To vote in favor of rehearing a case en banc should not necessarily mean that the judge is thereby committed to overturn the panel opinion as Judge Timbers pointed out dissenting from the denial of rehearing en banc in *Zahn* v. *International Paper Co.*, 469 F.2d 1033 (2d Cir.), *rehearing en banc denied*, 469 F.2d 1033, 1041, n.1 (2d Cir. 1972) (dissenting opinion of Timbers, *J.*, joined by Oakes, *J.*), *cert. granted*, 41 U.S.L.W. 3441 (U.S., Feb. 20, 1973) (No. 72-888). At the same time, if one agrees fully with the panel decision one does not generally vote to hear it en banc. I take the view that it is only when there is reasonable doubt on a point, or the question or questions are unresolved in the judge's mind, that he should vote for en banc, and then only in unusual or extremely important cases, or cases which conflict with prior decisions of this circuit or the Supreme Court.

Serious questions about the panel's conclusions as to the management of class actions exist. Class actions, I had thought, were "an invention of equity . . . mothered by the practical necessity" of providing a practical procedure to enable large numbers of litigants to enforce their common rights. *Montgomery Ward & Co.* v. *Langer*,

168 F.2d 182, 187 (8th Cir. 1948). *See* C. Wright, Federal Courts 306 (2d ed. 1970); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 375 *et seq.* (1967). The panel's decision seems utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to Fed. R. Civ. P. 23.

The panel opinion is at the very least highly debatable on its face since it requires, without even considering division of a large class into a much smaller subclass under Rule 23(c)(4)(B), an individual plaintiff to pay the cost of actual notice to the identifiable members of the entire class which he seeks to represent and since it declares—I may add without any support or citation of authority whatsoever other than judicial fiat—that "Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce." Slip op. at 3239.

The view of *Eisen II*, 391 F.2d 555 (1968), that Rule 23(c)(2) requires individual notice to all members of Eisen's class who can be identified through "reasonable effort" has been criticized as "unnecessarily restrictive . . . ." 7A C. Wright & A. Miller, Federal Practice and Procedure § 1786 at 148 (1972); *see also* Kaplan, *supra*, 81 Harv. L. Rev. at 396; Comment, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 139 (1969). Certainly given the importance of the class action as a means for the little man to bring wealthy or powerful interests into court, Eisen's inability to bear the costs of mailing notice to those 2,000,000 or so "easily identifiable individuals" similarly situated, *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253, 257 (S.D.N.Y. 1971), should not necessarily terminate the class action character of this suit. It may be appropriate, as Judge

Tyler suggested below, to charge the defendants with a portion of the notification costs. *See Dolgow* v. *Anderson*, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968) (Weinstein, *J.*); C. Wright, *supra* at 313-14. But even if these two questions were decided against the plaintiff, an en banc decision drawing sustenance from the flexible, still developing Rule 23 jurisprudence might embrace one of several other alternatives to the panel's burial of larger-number plaintiff class actions. These include the alternatives suggested by Judge Weinstein and others discarded in the panel opinion. But there are others, too.

The plaintiff class might, for example, be divided into much smaller subclasses, Fed. R. Civ. P. 23(c)(4)(B), of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified. *See* Kaplan, *supra*, 81 Harv. L. Rev. at 390-91; Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433, 438-54 (1960).

The problem of individualized notice under Rule 23 (c)(2) is so important to the future of class actions and the panel's resolution of it seems so inconsistent with the spirit of Rule 23, in short, that consideration by the full court seems essential.

At least as questionable is the panel's conclusion that this class action is unmanageable and should be dismissed because "no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class." Slip op. at 3238. The panel seems to intimate in a footnote that individualized notice to all 6,000,000 members of the class borders on being a constitutional requirement. Slip op. at 3239, n.21. This intimation seems to me to be pro-

foundly incorrect. In my view notice to class members who cannot be identified is not a constitutional requirement and not a prerequisite to a manageable class action. All that the due process clause requires is a procedure that "fairly insures the protection of the absent parties who are to be bound by [the judgment]." *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940) (not cited by panel decision). *See Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-14 (1950); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1960). *See also* C. Wright, *supra* at 313; Kaplan, *supra*, 81 Harv. L. Rev. at 391-92. *But cf. Eisen II*, 391 F.2d at 368-69. The Advisory Committee is a respectable body of procedural experts who did not consider individualized notice to all or a certain percentage of class members a prerequisite to the maintenance of a Rule 23 class action as a constitutional (or extraconstitutional) requirement. Advisory Committee Notes, 28 U.S.C.A., Rule 23 Supplementary Note at 302. The commentators generally agree. Assuming vigorous representation of the class's interests by the representative plaintiff (which is not in issue here), notice by publication to unidentifiable class members is constitutionally sufficient. *Mullane* v. *Central Hanover Bank and Trust Co., supra*, 339 U.S. at 314. A scheme of notice by publication (with costs perhaps taxed to the defendants) in financial journals of wide circulation —the *Wall Street Journal, Business Week, Barron's,* the *New York Times* financial section, and the like—would reach most of the class.

To say, as the panel opinion says, slip op. at 3239, that "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication . . . are a farce," and to say it without any supporting data or authority, strikes me as, in the words of the panel opinion, a "rhetorical device," slip op. at 3231. In this day and age of communications, why are such notices a "farce"? It

may be that most people will not heed them—the sums may be too small to bother with, for example—but does this make the notices farcical? Probate notices published in small-town newspapers around the country are treated as notice to the whole world of possible creditors and heirs that an estate is being closed, and they are pretty effective for this purpose. Notice by publication of actions such as this in key, spot places can be, I should think, highly effective. If notice in the "Drug Cases," *State of West Virginia* v. *Charles Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc.* v. *Charles Pfizer & Co.*, 404 U.S. 871 (1971), could work reasonably well, why can't it work with a somewhat more sophisticated group of consumers, odd lot buyers? Rule 23 was not looking toward perfect or total notification; it was—and I write of it in the past tense for this purpose—reaching out for a practical result that would permit numbers of little injured people to have their day, too, in court.

The panel opinion's suggestion, slip op. at 3243, that it should "be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer" is in my view an abdication of judicial responsibility. It is as much as to say that the courts are insufficiently inventive to be capable of handling a matter—the distribution of unlawfully obtained money to a large number of people. I doubt this very much. I suspect that the courts can do the job.

All in all, it seems to me that the panel's decision not merely ossifies, but destroys, the development of what was becoming an important procedural device for the airing of grievances where large numbers of people were affected and one individual did not have the resources to pursue his own legal rights to conclusion. At the very least the

panel opinion should not be allowed to stand without full and complete consideration by the full active bench of this circuit, aided as we would be by the consultation and vote of the two distinguished senior judges who sat on the panel in question.

The Case Should Be Heard En Banc.

One can argue, as many wiser minds than the writer's have argued, that a court of appeals should never use the en banc procedure. The Learned Hand court was apparently able never to sit en banc. *See generally* M. Schick, Learned Hand's Court 105-06, 116-22 (1970). But this was before the number of judges on the court was expanded to meet the court's burgeoning business. In other words, it was when the court and its business were small enough to enable a good deal more consultation before adjudication among the judges on the court than now does or can occur. Never to use the en banc procedure would tend to fragment a court of 14 or 15 judges into panels of three, enabling a given panel—which sometimes consists of judges not appointed to the particular circuit court—to determine cases for the whole court. If panel decisions absent an en banc procedure were to be binding on the other members of the court (as with an en banc procedure this court has always treated them in the past), there would be (A) an even greater burden on the Supreme Court than it now has to correct egregious error or to examine important cases and (B) an individual active circuit court judge's vote would count, at least in the Second Circuit, in only the 160-220 cases per year on which he sits and be of no significance whatever in the remaining 1,000± cases[5] coming before the court.

5 For fiscal year 1972, an unusually light year in this circuit, there were a total of 1,317 filings and 177 appeals terminated without decision. 1973's figures indicate that about 1,200 cases will come before the court.

In the event this court's tradition were to be broken and an individual panel's determination were *not* to be binding on the rest of the court, the Supreme Court's burden would be equally great and this court would be even more fragmented. Its decisions would merit only the support that the persuasiveness of the individual opinion writer or the prestige of the particular panel could muster. There would be no "law of the circuit" as such. The district judges and others who look to the Court of Appeals for guidance in their decision-making would find none.

Thus it seems to me that the en banc procedure, or some viable substitute for it, is essential to ensure cohesion, a degree of uniformity and the promotion of appellate justice, in the Court of Appeals. The en banc power has received the imprimatur of an 8-1 Supreme Court, in a case that is still law, as "a necessary and useful power—indeed too [sic] useful that we should ever permit a court to ignore the possibilities of its use in cases where it might be appropriate." *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 260 (1953). There are those of us, I suspect, who think the exercise of that power is one alternative preferable to the controversial national court of appeals which is receiving considerable attention these days.

The only viable alternative to the en banc procedure, if there is to be any genuine "court" position on a given case, is the prepublication circulation of all opinions for comment which is done in some circuits. This would be somewhat helpful but has the disadvantages of being advisory only, unless the en banc procedure is invoked; it also creates some work under the pressure of time deadlines additional to that which the en banc procedure permits. Prior circulation in seemingly important cases which is done in this circuit fairly frequently, with I think good result, but was not done in this particular case, has some merit, too; at

least it may alert the whole court to an important case or the opinion writer or panel to some serious questions. Here even this alternative has been unavailable.

There Is No Good Reason for Not Hearing This Case En Banc.

There is no real pressure of time (the lapse of time since *Eisen II* is five years; the Supreme Court is unlikely to examine the inevitable petition for a writ of certiorari until four or five months from now),[6] that would, as to some extent it did in the Pentagon Papers case,[7] make en banc rehearing or opinion writing unfeasible. There is no reason why the Supreme Court should not have before it some view, even if it is not a majority one, from this court, different from the panel's if, as I think is undoubtedly the case, an en banc vote would result in such.

It is said or suggested that this case is so important that it will surely result in a grant of certiorari. With all respect I do not know how we can be so prescient about the United States Supreme Court. It may decide that it wants to hear from other circuits, and have a more balanced view before it, than what is now the Second's, before it grants the all powerful writ. The Court may decide that it prefers to postpone the issue until another day, for reasons of internal administration or external policy.

I believe in short that our duty is to hear this case en banc. Since the panel opinion sounds the "death knell," *see Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), for consumer and environmental class actions, the omission to do so is to my

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6 We are told that the average en banc proceeding takes about 155 days. This is not really necessary in my view but in this case would not be too harmful.

7 *United States* v. *New York Times Co.*, 444 F.2d 544 (2d Cir. 1971), *rev'd*, 403 U.S. 713 (1971).

mind grievous. Perhaps, however, it will serve as a vehicle for a higher authority to tell us whether the admonitions of *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co., supra,* relative to the en banc procedure still have any meaning. If they do not, the world may not come to an end, but we will be an interesting court to watch as our eight active and six senior and numerous visiting and district judges go from decision to decision, guided 2 per cent[8] of the time by a grant of certiorari. We will at least be somewhat unpredictable, and this may create enough litigation on the chance that an individual panel may reverse that our calendar will become as unmanageable as the panel opinion felt the instant class action was.

8 From information furnished by the Circuit Executive of our court, in fiscal year 1972 there were 369 petitions for certiorari from the Second Circuit filed and only 18 granted. In fiscal year 1973, 284 petitions have been filed and only 12 granted. If in forma pauperis petitions are included as cases heard by our court, the percentage of certiorari grants is closer to 1.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1054

REUBEN J. KATZ, on behalf of himself
and all others similarly situated,

v.

CARTE BLANCHE CORPORATION,
Appellant

(D. C. Civil Action No. 69-1326)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 1, 1973

Before SEITZ, *Chief Judge*, ALDISERT, *Circuit Judge* and
FISHER, *District Judge*

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James S. Curtin
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OPINION OF THE COURT

(Filed May 22, 1973)

SEITZ, *Chief Judge*.

On this appeal,[1] defendant contends the district court erroneously granted plaintiff's pretrial motion to allow his suit to proceed as a class action pursuant to Fed. R. Civ. P. 23. Defendant asks us to reverse that determination and permit plaintiff to proceed only on his own behalf.

Defendant Carte Blanche Corporation is a national credit card company. Members must pay an annual membership fee and, in return, have the privilege of charging items at the company's associated establishments. As part of its billing procedures, defendant levies certain service charges and late fees. Plaintiff attacks the defendant's disclosure of its charges, and its membership fee as a component thereof, under the civil damage provisions of the Truth-in-Lending Act.[2] 15 U.S.C. §§1601, 1640 (1971). Under the Act, anyone injured by a violation of its provisions is entitled to recover twice the amount of his damages, but not less than $100 nor more than $1,000 per plaintiff, plus reasonable attorney's fees.

The instant problem arises from an individual plaintiff's assertion of the right to at least minimum recovery for each of a potential class of 800,000 similarly situated members of Carte Blanche Corporation. Defendant claims Congress did not intend class enforcement of the minimum penalty provisions of this Act; in the alternative, it contends the class is unmanageable under Rule 23. The district court concluded that while the issues were difficult, pretrial doubts should be resolved in favor of allowing the class action.

The two issues presented for resolution at this juncture

1. This appeal is an interlocutory appeal granted pursuant to 28 U.S.C. §1292(b) (1971), after certification by the district court.

2. Hereinafter cited as Act.

are: (1) the standard to be applied by this court in reviewing the district court's pretrial grant of the class action; and (2) under that standard, whether the district court erred in granting the motion. Subsumed into the latter issue is the question of whether Congress intended to bar any class enforcement of the provisions of this Act.

I. THE APPLICABLE STANDARD OF REVIEW.

Rule 23(c)(1) mandates that the district court determine as soon as practicable after commencement of a suit whether a class action is to be allowed. However, the district court retains discretion to modify that determination at any time before a final decision on the merits. This includes the discretion to decide later that class status was improperly granted and to dismiss that element of the proceeding. Thus, although the initial determination must be made without benefit of actual litigation of the case, the district court may modify its initial judgment after watching the litigation unfold. If it subsequently decides that its initial impression was erroneous, it can take appropriate action to remedy the error.

The district court's opportunity to review its own decision throughout the proceeding is part of the scheme in Rule 23 to vest broad discretion in the district court when dealing with class actions. Clearly, this broad discretion is essential if the court is to cope with the problems inherent in managing a class suit. Consequently, where the district court has granted a pretrial motion to proceed as a class, and where immediate appellate review of that order has been permitted, we conclude the appellant must make a convincing showing that the district court committed an abuse of discretion in granting the motion. Only then will this court intercede. *Cf. Interpace Corp. v. City of Philadelphia*, 438 F.2d 401 (3d Cir. 1972)(mandamus).

Four factors militate in favor of this standard. First, the district court has considered whether, in addition to

the other criteria imposed under Rule 23, the class is manageable. Since this involves a determination by the district court as to a litigation over which it will be presiding, this court should give great deference to that decision. Second, as previously discussed, the district court may itself review and modify or reverse its initial, pretrial determination throughout the pendency of the proceeding. This second point buttresses the policy of giving great deference to the district court's pretrial grant. Third, because of this continuing power of review and because of the procedural setting when the initial decision is made, the district court should generally resolve all doubts in favor of allowing the class. Thus, in challenging the pretrial grant, more than reasonable doubt as to the propriety of initially allowing the class must be shown. Fourth, there is no right to interlocutory appeal. This last factor, like the first and third, is reinforced by the presence of the second factor: the power of continuing self-review vested in the district court.

Therefore, where, as here, interlocutory review of the district court's initial grant of Rule 23 status has been permitted, there should be a high threshold for appellate intervention. We believe our decision to require clear and convincing evidence of an abuse of discretion is manifestly warranted in these circumstances.

II. APPLICATION OF THE STANDARD OF REVIEW.

As previously stated, the district court allowed this suit to proceed as a class action. In so doing, it properly resolved all doubts which it had at this initial stage as to the manageability of the class in favor of its allowance. Although defendant launches a broad scale attack upon the district court's determinations on the Rule 23 issues, the primary contention ripe for disposition in this appeal is defendant's claim that in fact the class is unmanageable. Two criteria set out in Rule 23(a) and (b) are crucial to a resolution of this issue: (1) whether the class is too

numerous to handle in one action; and (2) whether common questions of law and/or fact predominate among the class members.

Defendant contends common questions of law or fact do not predominate among this class of potentially 800,000 members. Since the Act is expressly inapplicable to business- or commercially-related transactions, it claims each person purportedly a member of the class would have to be cross-examined as to whether he used his card for consumer credit purchases. Additionally, it argues it would have to bring counterclaims under Rule 13(a) for past due debts of some twelve million dollars against purported members of the class. Defendant asserts these complications, when coupled with the sheer size of the potential class, render this class presumptively unmanageable.

We do not find defendant's arguments persuasive at this juncture. Since the Act covers only consumer credit transactions, definitionally, only those who suffered injury in such transaction are members of the class. Whether any individual used his card for business or personal purposes does not go to the validity of the class or its claim. Rather, it goes to proof of membership in the class. The failure to ascertain the bona fides of each purported claimant's membership will not affect the interim class adjudication on legal liability, except perhaps as to selecting a class representative who will adequately and fairly protect its interests [Rule 23(a)(3) & (4)].[3] Only after a determination has been made that defendant in fact is liable under the terms of the Act will the bona fide nature of each purported claim have to be resolved. Thus, at least for the purpose of adjudicating the controlling legal issue, the class is not per se unmanageable.

Our conclusion on this point is reinforced by the

3. Of course, purported members of the class would have to receive notice of the pendency of the proceedings under Rule 23(c)(2).

structure of Rule 23. Merely because the district court has decided to litigate one issue of this suit in a class action does not freeze it into disposing of the remaining issues through this procedural vehicle. Indeed, class proceedings may well be inappropriate for litigating these issues; the district court legitimately could conclude that class litigation would not prove the superior and most efficient method of adjudicating these subsidiary controversies. However, because of Rule 23(c)(4)(A), these potentialities do not affect the validity of the district court's present decision to grant class status.

Rule 23(c)(4)(A) provides that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues, . . . and the provisions of this rule shall be construed and applied accordingly." The Rules Committee, in adding this subsection, expressly foresaw the use of the class mechanism to dispose of issues common to a class even though other issues essential to a final resolution of the suit would have to be litigated in independent actions. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 106 (1966).

Clearly, the controlling question of law as to defendant's liability in this case is readily amenable to disposition by class suit. The question of defendant's liability under the Act involves a single determination of law. Thus, the task facing a court in making the threshold determination is essentially the same whether one plaintiff be involved or whether a class of 800,000 be involved. The additional managerial tasks forced upon a court are more than offset by the judicial economy realized in disposing of the controlling legal issue in one consolidation proceeding. However, having approved initially the class action as the proper method to dispose of the issue of defendant's legal liability, the district court, as we have said, is not frozen into this mode for the disposition of the remaining issues involved in this suit. Therefore, we cannot

accept, on these facts, defendant's claim that the class is per se unmanageable, at least at this stage.

The benefit for defendant in our present holding is two-fold. First, it is not exposed to the danger of repeated and possibly inconsistent adjudications on legal liability to those class members who do not elect to withdraw. Second, if the district court determines that defendant has incurred no legal liability under the Act for its conduct, the issue is *res judicata* as to any subsequent suit in any forum by any included member of the class on this cause of action.

III. THE LACK OF INTEREST EXPRESSED BY THE CLASS

Defendant contends that few members of the class have expressed an interest in these proceedings. It asserts that the plaintiff therefore seeks to impose an overwhelming and potentially disastrous liability on it on behalf of individuals who have no interest in the litigation.

The 1966 amendments to Rule 23 did not make positive assertions of interest the requirement for participation in the class. Rather, it installed the controversial "negative option" system. To be included, one need do nothing after receiving notice. Only if one wants to opt out is affirmative action required. The resultant thrust of the rule is not as to the quantity of the expressed interest. In fact, the absence of any affirmative manifestation by other members of the class at this initial stage seemingly would indicate their interest in being included. Instead, the central point of inquiry for the district court under the amended rule is the quality of the class representation. Therefore, we find the alleged lack of interest at this point immaterial to the question of whether this class action should be allowed to proceed.

IV. THE CONGRESSIONAL INTENT.

Defendant contends Congress intended only independent enforcement of the Act. It claims the basic purpose of the class action under Rule 23 was to allow aggregation of small individual claims to create an amount in controversy sufficiently large to attract counsel to pursue the claim. Congress allegedly intended to obviate the need for the rule under the Act by providing for recovery of at least $100 to the successful suitor plus attorney's fees. Therefore, defendant argues that Congress, by its drafting, implicitly proscribed class enforcement of the Act.

Against this, defendant paints a scenario as to the potential result if class treatment is accorded this suit. It claims it will suffer liability of up to eighty million dollars and bankruptcy if liability be found even though the class suffered only minimal damage from the alleged violation. Further, it contends the alleged violation constituted no more than a breach of a technicality in the Act. It argues Congress could not have intended to put responsible credit institutions into the dilemma of charting their path between absolute compliance with every technical provision of the Act on the one hand and bankruptcy on the other. Therefore, says defendant, Congress implicitly intended that class enforcement of the Act not be available because of the severity of the remedy imposed.

Defendant's contention assumes a positive correlation between class litigation on the underlying legal issues posed by the Act and class litigation on the issue of damages. However, because of the earlier discussed structure of Rule 23, merely because class treatment has been afforded litigation of the underlying legal issues does not mean that the issue of damages must be similarly adjudicated. Although Congressional policy in the Act may militate against class enforcement of the damage provisions, we do not believe this alleged prohibition in

any way affects our determination that the question of whether a violation of the Act's provisions occurred can be litigated in a class proceeding.

First, there is no express proscription against class treatment of private suits prosecuted under the Act. In allowing private suits, Congress intended the enforcement programs of the responsible agencies under the Act to be supplemented by the efforts of "private attorneys-general." Thus, Congress manifested a desire for strong and broad-scale enforcement of the Act.

Second, and most importantly, Congress has expressed a strong interest in the efficient administration of justice, manifested in its authorization of the Federal Rules of Civil Procedure. Since the original enactment of that mandate, the succeeding revisions and streamlinings of the Federal Rules have been submitted to Congress after adoption by the Supreme Court and before implementation in the federal courts. Thus, Congress has expressly passed upon and implicitly approved the attempt in Rule 23 to utilize one consolidated proceeding, where appropriate, to dispose of multiple suits involving common elements.

Consequently, we believe we have an express mandate of Congress to use Rule 23 if that will effect the most efficient disposition of a controversy while protecting the rights of the individual litigants. Where there is such an express mandate, we must warily regard any argument that implications allegedly contained in the terms of another act countermand that explicit mandate. The implications allegedly militating against class enforcement of the Act, by defendant's own admission, go to the assessment of damages. However, they do not go to the issue of whether class actions should be allowed in the declaratory resolution of the underlying legal issue here in controversy.

Our conclusion is buttressed first by the presence of an analogous provision in the Clayton Antitrust Act. 15 U.S.C. §15 (1971). That section provides for treble

damages and award of attorney's fees to successful litigants; it has long been enforced in class suits. Imputing such knowledge to Congress, as we must, we believe if Congress had intended the provisions of the Act not be similarly enforced in class proceedings, it would have included an express proscription in the Act.

Our conclusion is buttressed secondly by the legitimate interest of the judiciary in preserving its resources and in the efficient administration of justice. We think it can be said those ends are served by having the one legal issue common to potentially hundreds of thousands of suits adjudicated in one consolidated proceeding. Consequently, as to litigation of legal liability, the policy of the Act fails to overcome the lack of an express prohibition when viewed in the context of events contemporaneous to the passage of the Act and when coupled with the interest of the judiciary in conserving its resources.

If there is any implicit Congressional bar against class enforcement of the Act, it is as to the element of determining individual damages. However, we need not reach that question at this point. Should liability under the Act ultimately be found in the class proceeding, the district court then will have to consider whether the remaining issues are appropriate for disposition in class proceedings. In so doing, it first will have to determine, purely under Rule 23 criteria, whether the positive factors in favor of, or the negative factors against, allowing continued litigation by the class predominate.

If the district court should ultimately determine under Rule 23 criteria that proof of membership and defendant's counterclaims are appropriate for class disposition, it next must consider whether Congress intended to bar absolutely class enforcement of the damage provisions of the Act. If it finds no absolute bar, it will have to determine the weight it will attach to those aspects in the Act which might undercut allowing the class as to litigating damages. Once it has assigned a weight to those factors,

it must decide whether on balance, those factors, together with the negative factors under the Rule 23 criteria, outweigh the initial predominance of factors in favor of class adjudication of those remaining issues.

If the court ultimately determines these remaining issues should be disposed of in independent suits, it has the power to dismiss the class element of the proceeding at that point.[4] Each class member could then press his independent claim in any forum meeting venue requirements.

V. CONCLUSION.

In sum, we conclude the district court did not abuse its discretion in its pretrial determination that plaintiff could proceed on behalf of the class. Further, we conclude that, at the least, there is nothing in the Act which militates against litigation of legal liability under the Act in a class proceeding. We have considered defendant's remaining contentions, as well as the points raised by plaintiff on cross appeal, and find them inappropriate for resolution by this court at this juncture.

The order of the district court allowing this case to proceed as a class action will be affirmed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

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4. Such dismissal, of course, would in no way affect the validity of the class adjudication and determinations made up to that point.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U. S. C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

15 U. S. C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

15 U. S. C. § 78(f).

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any

provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

June 6, 1934, c. 404, § 6, 48 Stat. 885.

15 U. S. C. § 78aa.

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

28 U. S. C. §§ 1291 and 1292(b).

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85–508, § 12(e), 72 Stat. 348.

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from: . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951,